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Case No. 6294.

1914.

In the case of the estate of
J. M. Doyle, deceased,
vs. J. M. Doyle, surviving partner.

Executrix.

Appellant,

vs.

J. M. Doyle, surviving partner,

Respondent.

Case No.

Boyle now deceased and Castle were partners, from July 1906 until July 1914 under the firm name of Boyle & Castle Company. The partnership was terminated on the last named date by the death of Boyle. The firm was engaged in the grain and coal business at Bradley, Illinois, and also bought and sold several tracts of land in various places. While Boyle was in a sense of a silent partner, yet he was almost daily at the office of the firm, and looked to all the books and accounts of the firm and made entries in them, attended to some of the correspondence, drew checks and signed notes in the name of the firm, and was the cashier of the bank in which the firm kept its deposits and from which it frequently borrowed money, and he personally kept in touch with the business of the firm.

Besides that, by the terms of the partnership agreement, he hired and paid a man constantly to be at the office of the firm and assist in the conduct of the business. Castle had been in the grain and coal business before the firm was formed. While not an expert bookkeeper, he was able to keep and did keep accounts of grain and coal bought and sold and was a successful and conservative business man and was worth some money.

During the time the partners were in business together they did an extensive business, their deposits during that time aggregating more than \$2,000,000.

After the death of Coyle, Castle, continued the business until September 10, 1908. At the time of Coyle's death the firm owned considerable real as well as personal property and owned a number of debts aggregating a substantial sum.

Alice L. Coyle was named in the will of C. M. Coyle as his executrix and duly qualified as such. On August 26, 1908 she as such executrix entered into a contract with Castle by which among other things, it was agreed that he should take certain described lands owned by the firm in Iowa and South Dakota at the agreed price of \$49,800; that he should assume a mortgage indebtedness on the South Dakota lands of \$13,600 and interest thereon after March 1, 1909 and a mortgage indebtedness on the Iowa lands of \$4,200 and interest thereon after March 1, 1909; that he should then take out of the balance of the said \$49,800, \$9,052.58 and divide the same into two equal parts of \$4,526.29, one of which parts he should take in payment and liquidation of two obligations due from his deceased partner C. M. Doyle to

himself aggregating that amount. One of those obligations was for \$2,476.29 and grew out of a real estate deal in Monona County, Iowa, and the other was for 2050 and grew out of another real estate deal in Paintlick, Kentucky. The other one-half of said 9,052.58 it was agreed he should take in his own right to balance that drawn out for the use of his deceased partner's estate in the payment of the two obligations mentioned. The balance of the agreed consideration for the lands was to be paid by him in liquidation to the extent the same would reach of the outstanding obligations of the firm.

It was also stipulated in that agreement that the said Castle should collect all the debts due the firm including a certain obligation for \$8,200 and interest thereon, secured by a mortgage on lands in Canada and apply the same also to the liquidation of the debts of the firm.

It was therein further agreed that the executrix should take the grain elevator formerly occupied by the firm and certain furniture and personal property at the stipulated price of \$8000 and should have possession thereof on September 10, 1908, and that she should apply that amount of money so far as necessary to the payment of the debts of the firm left unpaid after the said Castle had applied all of the above mentioned funds as agreed, and in case none

or only a portion of that \$8000 should be required to pay the debts of the firm, then one half of it or what remained of it should be paid to Castle and the other

one-half should be retained by her for the estate.

It was further agreed that certain other sections of land subject to a \$12,000 mortgage should be divided equally between the said Castle and the said estate and that one-half of the said mortgage indebtedness should be assumed by each of the parties together with interest thereon after March 1, 1909.

Castle also obligated himself to dispose of a certain stock of hardware belonging to the firm to the best advantage he could and to return the proceeds thereof as assets of the firm, and that if after all the debts of the firm were paid, anything remained in his hands, he would pay one-half thereof to the executrix. They further mutually agreed to execute all proper and necessary conveyances to each other of the property each was to receive under the agreement.

On September 10, 1906 Mrs. Coyle took and has since retained possession of the elevator but has paid no part of ^{the} ~~the~~ consideration. On September 15, 1909 Castle filed in the County Court of McLean County his report as surviving partner of the firm of ... Castle & Co. and on January 31, 1910 he filed an additional report. By his first report he showed the receipt of \$96,489.07 and the disbursement of \$8,517.36, leaving a balance due him of \$87,971.71. By his amended or additional report he charged himself with \$200.35 moneys collected since the former report; with \$83.03 of accounts

not collected but which he offered to take at their face value and with \$2,663.05 which he says in his report is claimed by the executrix to be due from him but which he has been unable to verify and reserves the right in case his account is questioned to make proof regarding its correctness. The total of the items with which he charges himself in the additional report is \$3,847.03. In it he asks credit for \$2,624.20 in addition to the 2,028.29 shown by his former report to have been due him, or a total of 4,524.49, thus leaving a total balance due him of 805.46, if the item of 2,663.05 with which he charged himself was correct. The executrix filed objections to these reports and thereafter Castle, amended his additional report by changing the item of 2,663.05 with which he there charged himself to \$229.79. By this charge the account is made to show \$3,238.72 due Castle from the partnership. Still later and by leave of court he amended his amended report by striking out the charge of \$229.79 thereby adding that amount to the sum claimed by him as overpaid, making it \$3,468.51.

Numerous objections to the account were filed by the executrix. The matter was heard and determined in the County Court, appealed to the Circuit court and there heard and determined. The Circuit Court ordered appellant as executrix of the estate of C.W. Coyle to pay to appellee \$1072 due on note of C.W. Coyle, \$6,999.23 on

the purchase price of the elevator and \$50.64 as an individual, or a total of \$3,621.86.

The executrix has appealed from this judgment and in her argument here claims the evidence shows that Castle should have been adjudged to pay her the sum of \$6,809.42.

Appellant has assigned nine errors of the court for which she asks a reversal^s of the judgment. The first and second challenge the correctness of the rulings of the court on propositions of law submitted by the respective parties.

This was not a case where the parties were entitled to a trial by jury. Muld. after 73 Ill.App.576, reckearlage v. Simon 70 Ill. 71. Propositions of law may only be submitted in cases where the right of trial by jury existed and where the jury has been waived. People v. C.R.A. . . . 231 Ill.112 Schofield v. Thomas 236 Ill.417-418.

It is therefore unnecessary for us to determine whether the rulings of the Circuit Court on the propositions of law submitted were correct or not. Core v. Core 411 Ill. 303.

The third and fourth, charge that the court considered improper and failed to consider proper evidence. These assignments have not been argued^{argued} and are therefore considered waived.

The fifth is based on the overruling of appellant's first objections to Castle's report. This objection as amended is that said Castle paid his personal accounts by settling off claims due the firm

to the amount of \$1803.57."

The sixth, challenges the correctness of the court's ruling in overruling appellant's third objection to Castle's report. his objection as amended is "That Castle drew checks of the firm payable to himself personally for 10,130.75.

The seventh, is based on the overruling of appellant's sixth objection to the report which is "By error an account of Breneman land deal where in Castle claims a credit of 2,475.39."

The eighth, is that the court erred in overruling appellant's objections to the report numbered nine and ten and a amended objection number three. These objections are as follows:- No. 9, "By amount received for grain and not accounted for as shown by the books 43,000." No. 10- "By amount received for coal not accounted for ²⁰⁰⁰ ~~2000~~ and amended objection No 3 is "x x x that said 'D. Castle owes said firm on account of shortage in cash account as appears from the books and accounts the sum of 11,478.55!"

The ninth, and last error assigned is that the court erred in not rendering judgment for appellant for 6,809.49 and in not requiring the appellee to charge himself in his report with double that amount.

The last five assignments of error present the question whether the orders of the Court therein referred to are supported by the competent evidence in the record. unless they are clearly against the manifest weight of the competent evidence, the judgment of the

court must be sustained. Haug v. Haug 193 Ill. 645. Unless all the evidence upon which such judgment, order or decree is based is preserved in the record the same will be presumed to be correct. Allen v. Henn 197 Ill. 486. First Natl. Bank v. Barker 161 Ill. 231

Appellant relies chiefly on the testimony of Joe Heiser to show that the items referred to in the errors they have assigned should be charged to Castle. He is said to be an expert accountant. He was for some months in the employ of appellants as such expert working on the books of Castle Co. ostensibly, at least for the purpose of stating an account between the executrix of C. W. Cople deceased, and his surviving partner W. D. Castle. From his testimony it appears that he made extended extracts from the books of the firm some of which at least are offered as exhibits and which he says are correct. He also made a report to appellant's counsel the data for which he said he obtained from the books and records and other evidence of the business transactions of the firm, from cancelled checks, land transactions, the report of Mr. Castle, and from the records of the firm business in the State Bank of Gridley. That report was admitted in evidence, and he said in substance it was true and correct. As a witness on the trial he told of books and numerous checks and stubs of checks from which he gleaned the data to make his report, and most, if not all, of such writings were later introduced in evidence by one side or the other.

But only part of them are preserved in the record and less of them still are abstracted. Assuming that transcripts and abstracts conscientiously and faithfully made from books, accounts, checks, stubs and even letters are competent evidence at times when the data from which they have been made is destroyed, and assuming that an expert accountant might be permitted under some circumstances to testify to a balance he had struck in a set of books (Albee v. Schute 74 Ill. 173) we find no justification for holding that such secondary evidence can be accepted when the originals from which they are taken are also in evidence. Even if competent, little reliance indeed could be placed on such evidence if it is shown to be at variance in many material particulars with the data from which it is supposed to have been taken, or to be otherwise unreliable.

There is no dispute that this witness Feiger was the paid employee of a defendant. On the witness stand he admitted that where he found an item that he was uncertain about he charged it to Castle. He also admitted that he had made several errors in important items in the way he had stated the account. In several matters he is flatly contradicted by the data from which he claimed to have derived his information. Entries that he had stated in his report were made by Castle were shown to have been made by Coyle. Checks which he said were payable to Castle, and which he charged against him as having been appropriated by him personally were shown to have been made payable

to Castle & Co. and to have been applied to the benefit of that firm. He reported that Coyle in his lifetime had given a note to Castle for upwards to 2,400 in payment of a certain indebtedness. The only evidence of such a transaction was a note in the handwriting of Coyle for the amount named payable to Castle, and with ^{the} part torn off where the name of the signer would naturally be, and without any proof whatever that it had ever been signed, delivered, cancelled or paid by anybody.

It is no wonder the testimony and deductions of this witness did not have controlling weight with the trial court. With this in mind we will refer as briefly as possible to the last five assignments of error.

The fifth assignment of error is based on the contention that Castle paid off his personal debts to persons who owed the firm, by setting one account off against the other and failing to charge himself therewith to the extent of \$1803.37 as stated in her amended objections, but to the extent of \$2663.05 as stated in her assignment of error. In the argument appellant places her demand for the allowance of \$2663.05 on the fact that in his amended report Castle had charged himself with that amount. The record shows that when he filed his amended report containing that item he filed with it and in explanation of it the following statement:- "I also charge myself with the following sum claimed by executrix to be due from me, although I have

not been able to verify the, but assume that they are correct; reserving however, the right, if my account with the firm as stated here is questioned, to make proof as to the correctness and thus reduce the amount." When objections to this report were filed he recorded it in respect to this item and charged himself instead with \$229.71.

We do not think the fact that Castle charged himself with \$2663.05 in his report when considered with the statement above quoted amounts even to an admission against interest, much less proof that he should be charged with that amount.

Appellant also says that Castle admitted at one time in conversation with Mr. Sterling and Mr. W.J. Doyle that he should be charged with \$800 of this amount. The testimony of W.J. Doyle is referred to as showing such admission. He did testify that Castle "admitted" several such items should be charged to him and that he thought the amount was \$800. That testimony was a pure conclusion of the witness, was incompetent and was admitted over the persistent objection of counsel for appellee, as is shown by the record. The abstract fails to show these objections as well as many other essentials things appearing in the record.

Appellant next argues that Castle was the firm for coal and grain used by him to the amount of \$621.25, and not charged to him on the books.

The Circuit Court directed Castle to amend his report and to charge himself for these items the exact amount claimed. Why this was mentioned in the argument at all is inconceivable.

The sixth assignment of error is based on the contention that Castle had drawn checks payable to himself personally to the amount of \$9,935.88 which the evidence does not show was used for firm purposes.

Counsel for appellant has set out in his argument a list of figures representing dollars and cents set onosite certain dates, but containing no other memoranda to show what they represent. They say in their argument just preceding and in explanation of this list the following is a list of the checks which were drawn by Castle and payable to Castle and which do not appear to be for the benefit of the firm. This list is referred to in the evidence as "Exhibit "1" and is part of Exhibit "2" following page 403 of the record." No reference is made to any exhibit in the index to the abstract. We have examined a paper marked "Exhibit "1" found "following" page 403 of therecord. It contains 22 pages of typewriting. It is labelled "Report of Audit of the ... Castle & Co., Gridley, Illinois, June 18, 1895-September 10, 1906, Made for estate of C.M.Coyle by Gilbert W. Geiger, Peoria, Illinois." It is addressed to "Messrs. Felty, Sterling Whitmore, Attorneys for the estate of C.M.Coyle, Deceased." The first six pages of it are in the form of a letter at the foot of which is the name "Gilbert W. Geiger."

It is dated February 20, 1912. This letter abounds in unwarranted assumptions and unfair deductions. He is not content with reporting what the books show but proceeds to ~~say~~^{say} what the facts are, which of course he had no authority to determine. Following this letter there are some fifteen pages of dates, figures and footings which he refers to in the letter as "the following sheets". Among these sheets we find in the record, but not abstracted, the list of checks above referred to. This list is headed in the report with the following words "J. Castle & Co. List of checks ^{payable} ~~payable~~ to "J. Castle paid and ^{charged} ~~charged~~ to account of firm by the State Bank of Bradley." This list contains items totalling \$935.88. It may be mentioned in passing that C. J. Coyle, the deceased partner of Castle, was the cashier of that bank. We think it is not unfair to assume that the cashier of a bank on which checks are drawn and where the same are paid, who is also a partner in the firm to whom the same are charged, and who has access to the books of the firm, known of the transaction and whether the same is properly entered upon the firm books. Albee v. Richter 74 Ill. 173 Stuart v. Clenden 74 Ill. 122. Another list containing six items and totalling \$94.37 under the heading "List of checks chargeable to J. Castle" is found following the one just mentioned. Counsel in their argument say this list is of checks drawn by Castle on the account payable to other persons and not for the benefit of the firm. They have, however, failed to refer us to any proof that checks for the items in either of these two lists

were drawn on the firm account by Castle or that the proceeds thereof were used by him personally or for his benefit, except in the particulars. First, they say the items of the State Bank at Ridley are checks drawn by J. Castle and J. Boyle, and drawn on the J. Castle & Co. account in the Ridley State Bank; that before said is said, and cite us to the testimony of Boyle on confirmation thereof. The true testimony of Boyle is abstracted as follows:-

"I live in Ridley. I now in partnership with J. Castle in the grain business. I recollect a land transaction, of the kind J. Castle in which a check on the State Bank of Ridley for \$250. After my return home I paid my half of the check, either to J. Castle or Boyle, possibly at the bank. Cross examination; that check for \$250.00 was drawn by me and Castle when we were in town, and it was paid out of the firm account of J. Castle & Co., and it was to pay for land to J. Castle and Boyle, and when I got back I gave \$125.00 for my half of it, and it was entered in the bank book.

This fails to prove that the check was drawn on the account of Castle & Co. or how it came to be charged to their account in the bank, or that Castle never paid his half of it or that he failed to charge it self with it on the books of the firm.

The other is an item in the second list above referred to and is for \$4.70. For proof that it should be charged to Castle they refer us to the testimony of Henry Lessen who was Castle's personal representative in the firm and who kept the books of the firm and pre-



times gave checks. He said that when Castle was carried he was ordered to buy some cigars; that Castle told him to get them and Coyle said all right set them up to the boys, and that he bought the cigars and paid for them with the checks of Castle & Co.; that testimony would not warrant a finding that the cigars should be charged to Castle but tends to indicate that Coyle intended it to be a firm or joint expense. This testimony is erroneously abstracted as the testimony of E.F.Kent.

Independent search by us of the record and a reading of the so called abstract discloses some other testimony concerning some of the other items in these two lists which by itself would indicate that such items should be charged to Castle, but upon a full consideration of all the evidence to which we have been referred and that we have discovered, it is apparent that these lists are wholly unreliable, and that many of the checks representing these items were drawn for the benefit of the firm. To illustrate the first check in the lists given for 25.25 was given for the purchase of oats by the firm; the third for \$450 was given to buy a draft payable to the firm, which was endorsed in the handwriting of Coyle- "Pay to the order of Pope Lewis & Co." The sixth check for \$210.50 was to pay interest on a firm note. The eighth for 947.74 went to W.D.Castle & Co. on note. The ninth for 125.34 was also payment on note. The fifth for \$100 and the tenth for \$2042 evidently went to W.D.Castle on note held by him against the firm. As to some of these items already mentioned as well as to others, counsel in their argument

have referred to certain books, checks and stubs of checks which the record shown were introduced in evidence, but which are not made part of the record by copy or otherwise and which are not certified up for our inspection.

That those exhibits would show as to the balance of the checks in the list under consideration of course cannot be determined, without that evidence before us we are unable to say that the judgment of the Circuit Court is not amply supported by the evidence.

It is the duty of an appellant to bring before the Appellate Court all the evidence the trial court had before it relating to the questions of fact presented to this Court for review; failing in this it will be presumed that all such questions have been properly determined.

The seventh assignment of error is based on the theory that the executrix was overreached in the contract she entered into with Castle on August 26, 1908, wherein among other things, it was agreed that C.M. Coyle at the time of his death was indebted to Castle in the sum of \$2476.29 in a certain land deal. The only proof we are referred to in support of this contention is that after the contract was executed a note already referred to for that amount, in terms payable to Castle with the part torn off where the signature of the maker naturally would be found, and in the handwriting of C.M. Coyle, was found among his papers, and that he had at one time agreed to give such a note. There is no proof that the note was ever signed by Coyle or in fact by anyone else.

or that it was ever delivered to Castle or to anyone else, or that it was ever paid. It was offered in evidence by appellants, objected to by appellees, the court sustained the objection, and it was not admitted. The abstract fails to show this objection and the ruling of the Court thereon, but the paper is abstracted as if admitted in evidence.

The eighth assigned error questions the ruling of the Court in overruling the ninth and tenth original, and the third amended objections of the executrix to the partnership report of Castle. These objections were that there was \$43,000 received for grain and \$2000 for coal that was not accounted for, and that there was a shortage in the cash account of \$11,478.55. These objections are manifestly inconsistent for if \$43,000 received for grain and \$2000 for coal that was not not accounted for there would be a shortage of \$45,000 in the cash account instead of \$11,478.55.

As we understand appellants arguments they are not now insisting on any allowance for shortage on the grain account, and as to the shortage on the coal account they say the expert determined that from checks and drafts issued by the firm to coal dealers and from bills of coal shipped, found among the files of the firm and by reference to freight books of the railroad company. We are not referred to any place in the abstract or record where we can ascertain what any of these sources of information disclose, and we certainly would not be warranted in accept-

ing the deductions of the partisan expert eager, based upon such sources of information, to impeach the judgment of a court based on testimony of witnesses sworn and examined in the presence of the court and evidence duly authenticated and produced in and examined by the court particularly where his deductions are shown to be unreliable.

The ninth and last assignment is that the court erred in not rendering judgment for appellant for 6809.49.

In support of this assignment appellant argues the errors in computation presented by the other assignments and already commented on as well as others not heretofore mentioned, and in order to show that Castle has in his hands 13,618.96. of firm assets one-half of which \$6809.49 would belong to each partner, they charge the firm with 15837.09 as net profits on grain and coal and fail to give the firm credit for \$18,000 loss on grain that was from time to time sold in Chicago for future delivery to protect themselves against the possible fall of price of the same grain they contracted for with the farmers. It was a legitimate transaction with which both partners were undoubtedly familiar and reduced the profit on grain and coal by 18,000. When the net profits of 58,379.09 as computed by appellants is reduced by deducting the 18,000 lost in deals in Chicago, there remains but 40,379.09. of this amount 28,824.47 is in assets of the firm on hand, according to appellants own computation. That leaves but 11,554.62 of firm assets

to be divided, or \$5,777.26 for the estate of Coyle and a like amount for Castle. The record shows that the Coyle estate has already received \$7,967.82 or \$2,190.56 more than it is entitled to. Taking appellants own computation to be correct, except in the matter of the \$10,000 lost in Chicago, which loss should be borne equally by the partners, instead of being entitled to a judgment of \$6909.49 the estate owes the firm \$2190.56 and unless it is included in the assets of the firm in their computation, the estate still owes the balance of ¹⁰⁷²~~1422~~ on the note of C.W. Coyle given to and held by the firm, also whatever under ~~the terms~~ of the contract of August 26, 1908 she owes for the elevator, and also owes Castle personally the \$550.64 which the Court ordered her to pay and which is not challenged by any assignment of error.

It therefore appears from such an examination of this record as we have been able to make that appellant ^{fared} better in the circuit court than she was entitled to.

We desire lastly to refer to the manner in which this case has been presented by appellants. The abstract prepared by them is incomplete, incorrect and unfair in many respects. Many things are omitted from it that it was essential for this court to know. Even the index is of no practical value, besides three items, namely; "Judgment of the County Court", "Statement of Costs" and "Judgment in full," which on examination we find to mean the judgment of the Circuit Court, ~~there is~~

nothing indexed except the names of the witnesses and the pages where their testimony is supposed to be abstracted; and that is not correct in all instances. Not an exhibit is indexed and few of them are abstracted. Counsel in their argument in many instances have had occasion to refer to things they say are proven or that are contained in the record, but fail to refer to the abstract or the record by page or otherwise, so that this Court has been forced to frequently rummage through a record of about a thousand pages and an abstract of 143 pages, without chart or compass, in search of some piece of evidence that has been referred to. Appellee has furnished an additional abstract which in this case was sorely needed the costs for which are taxed against appellant.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

GENERAL NO. 6296.

OCTOBER TERM 1914

NO. 1.

G.F. BIEBER,

Plaintiff in Error.

vs.

AETNA INSURANCE CO., of Hartford
a corporation,

Defendant in Error.

GRAVES J.

*Errors to Circuit Court
Houltrie County.*

Plaintiff in error began his suit in August in the Circuit Court of Houltrie County, to recover from defendant in error for property lost by fire. The case was tried by a jury and resulted in a verdict for defendant in error and a judgment against plaintiff in error in bar of his action.

The declaration consisted of one special count and five common counts. In the special count is alleged the taking of the policy of insurance and the same is therein set out in long verba: That the property covered by the policy of insurance was destroyed by fire; that proof of such loss was duly made; that the defendant refused to pay the amount of an appraisal of the property under the terms of the policy and that the same was made pursuant to the terms of a contract entered into by the parties, and that defendant failed to pay the award made by the appraisers. The appraisal agreement and the award of the appraisers are set out in this count. With the common counts was filed a copy of the Insurance Policy, as a copy of the instrument sued on.

The defendant filed a plea of the general issue and six special pleas. A demurrer to all the special pleas was filed, and sustained as to the first, third and sixth, and was overruled as to the balance. An amended sixth plea was filed, and plaintiff in error elected to join issues on the second, fourth, fifth and amended sixth special pleas, as well as on the plea of the general issue. On the issues so joined the case was tried.

Several reasons are urged for the reversal of the judgment; viz. That the Court erred in overruling the demurrer to the special pleas; That the Court admitted improper evidence offered by the defendant; That the Court excluded proper evidence offered by plaintiff; That proper instructions requested by plaintiff were refused; That improper instructions were given at the instance of defendant; Misconduct of counsel and that the verdict is manifestly against the weight of the evidence.

A careful analysis of each of these questions would serve no useful purpose and would unduly extend this opinion. It is sufficient to say that by replying to the plea to which the demurrer was overruled plaintiff in error has waived his right to have the correctness of the rulings of the trial Court on the demurrer reviewed by this Court; that whether the verdict is so manifestly contrary to the weight of the evidence, and whether the conduct of counsel was such as to require reversal of the judgment are moot questions, in view of the fact that the judgment must be reversed for other reasons and the case remanded to the Circuit Court for another trial.

One of the material issues under the pleadings was whether defendant in error ever received any notice from certain persons or by the parties to apprise the loss. When one J.H. Good was called as a witness for defendant in error he testified in substance that defendant in error had received such notice from such persons. He answered over objection that it had not, and a motion of plaintiff in error to strike the answer from the record because it was manifestly hearsay was denied. The record had already shown that the witness Good was a special adjuster for defendant in error and that his headquarters was in Springfield; that the headquarters for Illinois of the defendant in error was in Chicago. There is no claim that the witness had any knowledge whatever of the subject of the inquiry. If he had any such information defendant in error knew it, and could have shown it and thereby obviated the objection. The objection to the question should have been sustained and the answer should have been excluded on motion.

The facts concerning many of the issues involved were strongly contested, and the evidence concerning the same was hopelessly conflicting. It was therefore important that the jury should be accurately instructed. Several errors were committed by the Court in the giving and refusal of instructions. Plaintiffs refused instruction No. 2 correctly informed the jury as to the law on the question of burden of proof of the issues raised by special pleas. Plaintiffs refused instruction No. 3

correctly stated the rule as to what would constitute a prima facie case and also the rule that the burden of proving special loss was on the defendant. Plaintiffs refused in-instruction No. 7 correctly stated the law as to what constituted a prima facie case and when the plaintiff was entitled to recover on making such a case by his proof. During the trial a paper was offered in evidence by the defendant in error and known in the record as "Defendant's Exhibit 1". It was a list of property which defendant in error claims was delivered to it by plaintiff in error as a list of insured property destroyed in the fire, but which plaintiff in error insists was never intended as such list and was never delivered to defendant in error as such. Plaintiffs refused instruction No. 8 properly presented to the jury his theory of that particular branch of the case. The propositions in the refused instruction mentioned were not presented to the jury by any given instructions, and they should each have been given.

The policy sued on contained a provision that in case of loss, when required by the company "the insured shall submit to examination under oath in regard to all questions relating to the claim". After the fire and before this suit was commenced, defendant in error demanded that plaintiff in error submit to examination pursuant to the terms of that clause of the policy. This he did. The examination was conducted by a representative of defendant in error and was had before a notary public in Moultrie County. During that examination plaintiff in error was

asked concerning the paper heretofore referred to as "Defendant's Exhibit 1" and concerning discrepancies existing between the contents of that paper and the list of property delivered to defendant in error by plaintiff in error with his claim for insurance. Exhibit 1 contained articles of property not contained in the list filed with the claim. These questions, under the advice of the attorneys then present, plaintiff in error did not answer for the well known reason that they were not material and did not relate to the claim. The refusal to answer these questions was made the subject of a special plea in bar on which issue was joined. By instruction No. 4 given at the instance of defendant in error it was left for the jury to determine as a question of fact whether the questions referred to were material to the inquiry conducted before the notary. Clearly that was not a question of fact to be determined by the jury under a plea in bar, and it was error to so instruct the jury. If the questions put had been material, such error would hold, the failure to answer them could only be taken advantage of by a plea in abatement of the writ and not in bar of the action. Bonner vs. Ins. Co. 13 Fin. 677. While we are not on this record called upon to determine whether the questions which plaintiff in error refused to answer on the examination before the notary were material, if it were here presented, we would have no hesitancy in holding that only such questions are material on such an examination as have a bearing on the insurance and the loss, and that the questions referred to here

certainly did not relate to either of these subjects. Titus v. Glenn Falls

Ins. Co. 81 N.Y. 10.

For the reasons suggested the judgment of the Circuit Court must be reversed and the case remanded to that Court for another trial.

Reversed and remanded.

715
GENERAL NO. 6311

OCTOBER TERM, 1911.

MINNIE SCHOENLE.

Plaintiff in Error.

vs.

GREAT EASTERN CASUALTY CO.,

Defendant in Error.

IN OPPOSITION TO THE COUNTY COURT
OF SANGamon COUNTY.

GRANTEE J.

One Paul Schoenle of Springfield, Illinois, secured an insurance policy in the United States Health and Accident Company of Chicago, Michigan. One Robert Bell, agent of that company at Springfield, Illinois. That company paid to Paul Schoenle on that policy \$41.00 in September 1909; \$33.00 in January 1910; \$11.00 in March 1910; \$44.44 in May 1910; and \$11.00 in January 1911 as indemnity for injuries. Upon the payment of the last sum of indemnity that policy was cancelled. The insured then requested Bell, the agent of that company who knew all the facts, to procure for him a policy in some other company. Pursuant to that request Bell went to Milburn, the agent of defendant in error, and asked him if he could write a policy for the insured, and on that trial testified that he told Milburn the circumstances of the United States Health and Accident policy and its cancellation, and that Milburn said he would write the policy. Milburn then furnished to Bell a blank application to be filled out and signed by the insured, and Bell went to the insured and secured his signature to the application with only part of the sections in it filled. In that shape the application was delivered to Milburn, and on it in February 1911 a policy of accident insurance was issued. Milburn never gave the insured in connection with the application. In June 1911 the insured died. Whether his death was the result of

accident is a controverted question. Plaintiff in error was the wife of the insured and the beneficiary named in the policy. The policy was issued, and plaintiff in error brought suit to recover the amount of the insured indemnity.

The case was tried by a jury. At the end of the evidence offered by plaintiff in error a motion by defendant in error to instruct the jury to find the issues for the defendant was interposed, and on consideration was overruled by the Court. Again at the end of all the evidence a like motion was interposed by defendant in error and this time it was sustained; the jury was so instructed and duly returned a verdict in accordance with the instruction. On this verdict a judgment was in due time entered against Plaintiff in error in bar of her action and for costs.

Defendant in error contends that the application was part of the policy and the statements therein contained were warranted to be true and were material and binding on the applicant and all persons claiming under it, and that there was such fraudulent misrepresentation and concealment in the application as to void the policy. The particular fraud complained of is that the applicant did not disclose in his application that the policy he had formerly held in the United States Life and Accident Company had been cancelled by that Company, or that he had received from that company the several items of indemnity above referred to. The application was made on a printed blank supplied and furnished by the company. It contained numerous statements of facts, each of which was in part printed in the blanks as furnished. After each printed statement there was a blank space left in which it was manifestly intended the applicant should complete the particular statement by writing in whatever fact was necessary. One of these printed statements was:-

"No application ever made by me for insurance of any kind has been declined or any such policy of insurance cancelled or renewal refused by any company, association or society except as herein stated."-----

Another Tag:- -

"I have not been disabled by accident or illness during the past four years to exceed in the aggregate----- weeks; nor have I received more than \$----- as indemnity for time lost during that period."

The blanks in neither of these two statements were filled out when the application was signed by the insured and delivered to Milburn. Defendant in error insists that the failure to fill them out was equivalent to an affirmative statement that he had never had a policy cancelled, he had never been disabled nor received indemnity for the same, during the last five years before making the application.

It never might have been the intention of the applicant with reference to the application signed by him becoming a part of the policy or contract of insurance, the company clearly did not so treat it. The policy as issued recites that the consideration for it is the premium of two dollars (\$2.00) per month and the statements, warranties and ~~agreements~~ agreements "in the application, a copy of which is endorsed hereon and made a part hereof." A comparison of the application which the proof conclusively shows was the only one ever signed by the applicant for insurance with defendant in error, with the purported copy of an application endorsed on the policy, discloses the fact that they are entirely different both in form and substance; some of the statements are similar and perhaps some of them are identical, but the documents as a whole are so different as if made by two

different companies without consultation. To detail the difference between these two papers would require too much space and would serve no useful purpose. It is enough to say that by the recital in the policy, and a comparison of the original and the purported copy thereof on the policy, it is made clear that the application signed by the deceased was never made part of the policy by the company. Even if the two printed statements above quoted with the blanks left for additional facts unfilled could be construed as untruthfully stating that the applicant had never had a policy cancelled and had not during the five years last previous been disabled nor received indemnity for the same, still the policy cannot be avoided for that reason, if Milburn the agent of the company, who accepted the application and personally issued the policy, knew at the time the truth to be that the "United States Health and Accident" policy had been cancelled and that it had paid to the insured the several items of indemnity above referred to. An insurance company cannot forfeit a policy for causes known to the agent who issues the policy at the time the same was issued. Provident Life Society vs. Cannon 101 Ill. 269 and cases there cited.

There was proof that such facts were fully made known to Milburn the agent, and it was for the jury and not the court to determine whether it was true or not.

It is also contended by defendant in error that the insured was not a temperate man and that death was not caused by accident but was due to alcoholism. There were also questions of fact for the jury concerning which the evidence was conflicting. The Court could not properly determine them on a motion for a peremptory instruction.

The Court erred in giving the peremptory instruction.

The Judgment of the Circuit Court is therfore reversed and the cause is remanded to that Court for another trial.

Reversed and remanded.



201-6 230

GENERAL NO. 6326.

OCTOBER TERM, 1914.

ACQUAINTANCE.

WILLIAM DOWLAND AND DONNA DOWLAND, Administrators with the will annexed of the

ESTATE OF MINERVA JANE OWENS. Appellees.

vs.

JOSEPH D. STALEY AND WILLIAM Y. Staley, Executors of the Last Will and Testament of

DANIEL STALEY, DECEASED. Appellants.

APPEAL from the CIRCUIT COURT OF SANGAMON COUNTY.

GRAVES J.

Daniel Staley and Minerva Jane Owens were brother and

sister. He was a banker accustomed to the handling of money and the management of affairs. She did not even learn to write her own name until late in life. As early as 1880 and for many years thereafter, he had in his hands considerable sums of money belonging to her and paid out to and for her numerous sums. This money she never handled by him in his own name. In January 1911 she was adjudged to be an imbecile person, and one William E. Dowland was appointed conservator over her and her estate. In June 1911 she died leaving a will in which she made her daughter Donna Dowland her chief beneficiary. Donna is the wife of William E. Dowland. William and Donna Dowland in due time became the administrators with the will annexed of the estate of the said Minerva Jane Owens. In August, 1911 they, as such representatives

of that estate, filed their bill in chancery in the Circuit Court of

Sangamon County for an accounting. The substance of the foregoing

facts ^{was} ~~is~~ alleged in the bill, and it ^{was} ~~is~~ there charged that Daniel Staley

was a trustee of the funds of his sister Minerva that had been in his

hands since 1889. On September 30, 1911 Daniel Staley answered this

bill, and on December 16, 1911 he filed an amended answer denying all

the material averments of the bill, and averring that he had not only

accounted to his sister for all the moneys he had ever had in his

hands belonging to her, but that she was indebted to him for upwards

of \$2000.00, which he

for her by him ;

missed with

Later

am

limitations as a defense and also filed a cross bill in which they averred

that at the time the original bill was filed the estate of Minerva Jane

Owens owed the said Daniel Staley \$1200.00 and that at the time of the

filing of the cross bill that indebtedness by reason of accrued interest

amounted to \$1346.49. They then pray for a decree awarding that

amount to be paid to them by the representatives of the estate of Minerva

Jane Owens. Issue was joined on the cross bill, but it was stipulated

that no further testimony should be taken by either party on the issues

so framed. During the taking of the testimony before the Master and

while Daniel Staley was yet alive, William and Donna Dowland offered

themselves as witnesses and gave testimony on behalf of complainant.

After the taking of testimony before the Master was concluded and after

the death of Daniel Staley, a motion was made by the representatives of

the Staley estate to exclude the testimony of the witnesses William

and Donna Dowland, because they were interested witnesses and not com-

petent under the statute. No ruling on this motion ^{was} ~~is~~ shown in this

record. During the taking of evidence before the Master ^{defendant} ~~complainant~~

offered in evidence numerous writings as exhibits. They consisted for

the most part in receipts and checks, purporting to bear the signature

of Minerva Jane Owens either on their face or back. The genuineness of

the signatures on several of these exhibits was contested and each

evidence was introduced by both sides on that question. The Master found that several of those exhibits did not contain the genuine signature of Mrs. Owens. Among those exhibits the signature to which the Master found was not genuine were exhibits numbered 50, 51, 52 and 53.

Exhibit No. 50 ^{was} ~~is~~ a purported receipt for \$50.00 dated December 31, 1881;

Exhibit No. 51 ^{was} ~~is~~ a purported receipt for \$50.00 dated April 17, 1882;

Exhibit No. 52 ^{was} ~~is~~ a purported agreement in the following words and

figures:-

"Lowri, Ill. April 17, 1882.

I make this agreement with David Staley that he is to have the interest on what money I have in his hands belonging to me that may accrue on the same for his services for attending to what business I have in routine and taking care of what money I have and to turn over the principal when I call for the same.

"V.J. Owens."

Exhibit No. 60 ^{was} ~~is~~ a list of supposed payments of money by David Staley

to, or for the benefit of Mrs. Owens running in amount from \$20.00 to

\$749.00, but in most instances not exceeding \$50.00, and running in

time from 1880 ~~to 1882~~ to 1906. At the bottom of this list ^{was} ~~is~~ the

"Received the above amounts. V. J. Owens."

Upon the report of the Master being filed in the Circuit Court, numerous exceptions were filed to it by both ^{defendants} ~~plaintiffs and defendants~~.

Those of ^{defendants} ~~plaintiffs~~ among other things raise the question of the

correctness of the Master's findings that the signatures to the particular exhibits mentioned were not genuine, and the Court, after a full hearing and deliberate consideration, followed the finding of the Master in that respect.

In the account as stated by the Master, the estate of Staley was charged with \$6936.00 made up of three items, namely - \$410 received in May 1889 from the sale of real estate, \$1945 received in 1894 from the sale of real estate and \$2831 for interest received by him from funds invested so far as shown by the evidence, and was credited with disbursements of \$4562.75, and he recommended a decree against ~~the~~ ^{defendants} ~~estate~~ for the payment of \$2773.25. The Court in settling the account followed the Master's account except in two particulars. The charge of \$1945 as found by the Master for moneys received in 1894 was increased by the Court to \$2295.25 and the credit of \$7.00 as found by the Master for money paid in 1889 on a mortgage on the first piece of real estate sold was increased by the Court to \$1000.

In all other respects the account as stated by the Master and the one stated by the Court ^{were} ~~are~~ identical. The total charge in the account stated by the Court were \$7286, and the total credit were \$4862.75, leaving a balance found by the Court to be in the hands of the executors of the Staley estate of \$2523.25, and they were decreed

by the Court to pay that amount to ^{complainants} ~~appellees~~ in due course of administration.

The executors of the Stanley estate have appealed to this Court and appellees have filed cross errors.

The first important question to determine is whether a Court of Equity has jurisdiction to determine the rights of these parties in an action for an accounting.

On the part of ^{defendant} ~~appellee~~ it ^{was} ~~is~~ contended that the relation of

Mrs. Owens and Mr. Stanley was that of principal and agent merely. On

the part of ^{complainants} ~~appellee~~ it ^{was} ~~is~~ insisted that Stanley was a trustee of an

express trust holding and managing the funds of Mr. Owens in his

hands for her use and benefit. ~~While the trust agreement has not been~~

~~proven by any writing or by the testimony of any witness who heard an~~

~~oral agreement made, it is however a fair inference from the competent~~

~~evidence in the record that, Pursuant to some understanding between~~

this brother and sister, she placed in his hands the funds derived from

the sale of her realty, to be managed by him in his own name as his own

property and for her use. ~~The evidence before us fairly tends to show~~

^{It appeared that} ~~when~~ any part of the consideration for the real estate was paid,

it was paid to him; that a note for the deferred payment of \$1000 on

the first sale was taken and collected by him; that he collected the deferred payments on the second sale of her real estate for which she gave her bond for a deed; that he loaned parts at least of the fund in his own name and collected the same; that at one time she seemed to have made some suggestions in relation to the collection of one of these loans that had been made to a son of hers, which suggestions Staley resented and proposed to surrender the note to her and said - "I will do what I do in some sort of legitimate way and not let him or anybody treat me with contempt;" that he did not surrender the note to Mrs. Owens but did later collect it; that all funds received by him were deposited by him in his own name and when he had occasion to pay the same out he did so by giving his personal check against his own account, ~~that Mrs. Owens knew the manner in which he was managing the estate is shown by the fact that~~ Between 1889 and 1906 the money she received from him was paid to her by his personal check drawn on his private account. In one instance he deposited a part of the fund in a bank in his own name and arranged that checks signed by her in his name should be honored. This fund he reserved the right to withdraw, and he did withdraw it after she had drawn seven checks for the aggregate amount of \$375.50 and signed his name to them.

person, called a trustee, for the benefit of another, called the cestui que trust, with respect to property held by the former for the benefit of the latter. An express or direct trust is one created by the acts of the parties, while an implied trust is one raised by operation of law. Trusts in real property must in most states be created by writing, but express trusts in personal property may be created by parol. Maher v. Aldrich 205 Ill. 242. We think the evidence fairly tends to show the creation of an express trust by the acts of the parties, in the funds derived from the sale of the real estate of Mrs. Owens that was turned over to Staley, and the interest actually received by him thereon. Clapp et al vs. Emery 98 Ill. 503. A Court of Equity has exclusive jurisdiction to determine the rights of the parties in matters relating to express trusts. The Circuit Court had jurisdiction in this case. It is next urged that this action is barred by Statute of Limitations. That statute does not run to bar the recovery of a trust fund until the disavowal of the trust by the trustee. Maher v. Aldrich supra. Grant v. Odierne 43 Ill. App. 400. Lancaster v. Saringer 239 Ill. 472. In this case no disavowal of the trust is either

pleaded or proven.

It is next contended by appellants that both Wallis and Dowland were incompetent witnesses under the provisions of section 2 of Chapter 51 R.S., and that the Circuit Court in reaching its conclusions erroneously considered and gave weight to their testimony. Appellants contend that, as their evidence was taken while Daniel Staley was alive, they were competent witnesses while they were testifying, and that being competent while testifying the fact that before the case was disposed of they became incompetent by the death of Daniel Staley, their adversary in the litigation, will not render them incompetent. The reasoning of appellants is persuasive and has been held to be the law by courts of great learning in more than one jurisdiction. We do not, however, regard it as an open question in this state. In Quicke v. Pryor, 29 Iowa 481, the Supreme Court of Iowa held that within the meaning of a statute similar to section 2 of our evidence and deposition act, above referred to, the competency of witnesses to testify must be measured not with reference to the time the testimony is given, but with reference to the time of the trial when it is considered. In other words, the witness must be considered as testifying at the time of the trial and not at the time he gave the testimony, if those times are different.

Our own Supreme Court following the Quick case said in Smith v. Billings

177 Ill.446 "We cannot agree with the contention, nor the final decisions which seem to sustain it, that the test of competency of complainants' testimony at the final decision of the case in any way depends upon its competency when taken." In other words, no matter how competent the testimony was when given, if for any reason it is incompetent at the time of the trial, it must be excluded from consideration.

It is perfectly clear that, if William and Donna Dowland had offered themselves as witnesses at the time their testimony was submitted to the Court for consideration, it would have been excluded. As under the rule stated, their testimony was incompetent and should have been excluded, the fact that after the testimony of these two witnesses had been taken before the Master, Daniel Staley, since deceased, was sworn and testified to some things in contradiction of their testimony, can have no influence on the question of the competency of those witnesses.

It was for the complainants in the bill to make out their case by a preponderance of competent evidence. Until that was done it was not necessary for the defendants to move. Smith v. Billings 76 Ill.App.1st, affirmed in 177 Ill.446.

The testimony of Donna and William Dowland being competent, it ~~may~~^{must} be presumed that the trial court did not consider it in making

its findings, and this Court in determining whether the findings of the trial Court are supported by the evidence must disregard their testimony.

The account as stated by the Court in its decree, charged the estate of Daniel Staley with the receipt of \$416. in May 1889 and \$ 35 in 1894 from the sale of lands belonging to Minerva Jane Owens, and with \$231 interest received by Staley from funds invested belonging to Mrs. Owens making a total of \$726.

Appellants admit that the first charge of \$416 is correct but insist that the second item should have been \$1945 instead of \$ 35, and that the interest charge is also incorrect. ~~The record conclusively shows that~~ the land from the sale of which the second charge of \$1945 arose was sold by Staley for that amount but ~~plaintiffs~~ ^{defendants} insist that \$300 of that was paid directly to Mrs. Owens and that \$640 went for expenses in connection with the transaction. ~~We have examined the record for proof to illuminate this contention and find that~~ a letter bearing the signature of Daniel Staley and addressed to his sister Minerva ^{was} introduced in evidence and marked "Exhibit 3" recited that he had sold the land, the price to be paid for it, the amount he received down, and the fact that the balance not received down was to draw 7% interest.

This letter was received in evidence without objection and no motion to exclude it was ever made, neither was it genuinely ever challenged.

in the Circuit Court or before the Master. It is too late on appeal to

complain for the first time that it was not properly identified, ~~the~~ *The*

facts recited in that letter ^{were} ~~was~~ nowhere contradicted by competent evi-

dence. Daniel Staley did testify that \$300 of the \$2495 for which the

second tract of land sold was paid by the purchaser directly to Mrs.

Owens, but he was clearly an incompetent witness to give such testimony.

He was a party in interest defending a suit brought by the representa-

tives of a deceased person. Section 2 Chapter 51 R.S. And even if he

were a competent witness, his testimony in his own interest given years

after the transaction was closed, flimsily denying the contents of a letter

written by himself at the time of the transaction would scarcely be

sufficient to warrant a finding that the admissions made in that letter

against his interest were not true. We think the Court properly charged

the Staley estate with the full amount for which the land sold.

The item of \$231 interest charged by the Court against the

Staley estate was contested before the Master and also by exceptions

before the Circuit Court. The Master found that Staley had received that

amount of interest on moneys invested, and the Circuit Court followed

the Master's findings in that respect.

Two reasons are urged why this interest charge is erroneous;

First, that the evidence does not support it, or to put in the language

of counsel for appellants "there is no evidence that he received any such amount of interest, the only interest shown by any competent evidence to have been paid to him was the sum of \$272.70 x x x."

Second, that by a certificate in writing offered in evidence purporting to be signed by Mrs. Owens she agreed that Mr. Staley should have the interest for his services.

To the first contention the answer is that where, as in this matter the finding of the chancellor on a question of fact follows the finding of the Master, an appellate court will not reverse the decree on the ground that it is not supported by the evidence, unless it is clearly contrary to the manifest weight of the evidence. Day v. Wright

233 Ill.212, Buddy v. McDonald 244 Ill.494. In this case it is admitted that Staley received in 1893 \$272.70 interest on a \$700 note given by one John Owens to Staley for a loan. The evidence also fairly tends to show that he received in 1894 from Eli Walker four years interest on \$1945 at 7% or \$544.60. It also shows that he received be-

in 1892 some interest on the \$1600 deferred payment on the

for

can.

certain

amount at least equal to \$831. Besides this Daniel Staley admitted while on the stand that he had made a statement at one time under oath to the effect that he had received \$831 interest for his sister, on some notes. We are not able to say that the finding of the Court regarding the interest charge is contrary to the weight of the evidence.

The document which appellants make the basis of their claim that Mrs. Owens had agreed with Staley that he should have the interest for his services so far as it pertains to that subject is as follows:-

"Lewist, Ill. April 17, 1895.

I make this agreement with Daniel Staley that he is to have the interest on what money he has in his hands belonging to me that may accrue on the same for his services for attending to what business I have in renting and taking care of what money I have. x x x."

By its terms it applies only to such interest as may thereafter accrue on money then in his hands, and has no reference whatever to the items of interest which had before that time accrued, and we have seen that the interest he received prior to the date of the document above quoted at least equalled the entire amount with which he is charged in the decree. All the items of receipts with which the Staley estate is charged are supported by the evidence.

Appellants complain that the Court failed to allow three items

of credit to the Staley estate; the first is an item of \$1000, loaned to one John Owens a son of Mrs. Owens about 1883. The record shows that the loan was made by Staley in his own name and that he regarded himself responsible for its collection. In 1892 after making several unsuccessful efforts to collect the interest he wrote a letter to his sister offering to turn the note over to her. This evidently was not done, for in 1893 he again wrote his sister telling her what he had told John, which was in part as follows - x x x "I told him that it was your money, and I would do as you said, but if I done with it as I thought best that I was going to have it different from what it was; that he would have to give me a new note for the \$1000, with security in place of you; that I was not going to have the trouble to get the interest that I had been having, so if you want me to conduct it on business principles he must do that way, or I will collect it x x x." Whether this note was ever collected the record does not disclose. Neither is there anything to indicate that Staley was prevented from pursuing his own course about the matter. Clearly credit for that \$1000 should not be given the Staley estate until it is shown that the money or the note Staley took for it has been turned over to the estate of Mrs. Owens.

The other two items for which appellants claim credit seem to



stand on the same footing. One is for \$551.60 and the other for \$500, which appellants claim Staley paid to Mrs. Owens in person. The only evidence offered ^{of two claims} To show ~~these~~ payments are two receipts; the first

dated December 21, 1891 and the other dated April 17, 1892. Each purporting to be signed by Mrs. Owens. The genuineness of the signatures to these two receipts ^{was} ~~has been~~ vigorously contested all through this case. Several witnesses have expressed their belief each way, a few more competent witnesses have expressed the opinion that they are genuine than have that they are not. Both the Master and the court found that they were not genuine. There are several circumstances other than the testimony on the question of the genuineness of the signatures that tend to discredit these receipts. It seems inconceivable that a man of sufficient business ability and experience to be a banker would fail to keep books of account of receipts and expenditures of funds which he was handling for others. If such books were kept and these items were in fact paid as now claimed, why were they not produced in corroboration of this claim, or their absence explained, particularly when the genuineness of these receipts were put in question?

Again in 1906, years after these items were ^{claimed to be} paid, if they were ever paid, Staley caused a statement to be made of moneys paid to and expended for Mrs. Owens. It covers the period from early in 1889 to

some time in 1906. It was evidently made for the purpose of procuring a blanket receipt from Mrs. Owens, for the items therein contained, for at the bottom appear the words, "Received the above amounts. M. J. Owens." and it was introduced in evidence by appellant as being a genuine receipt from Mrs. Owens. It contains a large number of items varying in amount from \$20 to \$600, some of which are evidenced by other receipts and some that are not. A majority of these items do not exceed \$50 each yet these two contested items although they are for substantial sums are not included in that statement, and no explanation of their omission is made. The genuineness of the signature "M. J. Owens" at the bottom of this statement is questioned by appellee and the Court, following the findings of the Master, found it was not her signature. Regardless of whether the signature is genuine or not, the contents of this statement so prepared and introduced in evidence by him is competent evidence against him in the nature of an admission against interest, and tends to show that the two items in question were not paid as now claimed.

There is still another circumstance worthy of note in this connection, and that is this, if these receipts are genuine and these items were paid as claimed, and he is given credit in his accounting for the \$1000 loan made to John Owens, Mrs. Owens would have been in his

debt for a very considerable amount many years before her death. Yet he continued to send her moneys and allowed her to check in his name against his account, and even after a conservator had been appointed for her, he paid to him \$129.70 for her. There is no suggestion from him that such payments were intended as charities or loans and we certainly cannot presume he was ignorant of the real condition of the account between them. His actions speak louder against the validity of these claims and receipts than his words speak for their genuineness.

We have carefully examined and considered all the competent evidence in this record on this subject and are forced to the conclusion that the Circuit Court was justified in holding that these two claims and the receipts by which they are supposed to be evidenced are spurious.

Appellants further urge that the findings of the Court that the signature "M. J. Owens" following the words "Received the above amount" at the bottom of the statement of items paid from 1899 to 1906 is not her genuine signature is not supported by the weight of the evidence.

Under the rule already announced and supported by the Court in Day v. Wright and Ruddy v. McDonald, supra, we do not feel warranted in holding that the finding of the Court in this particular was not justified.

As to the errors assigned by appellant, the judgment of the Circuit Court must be affirmed.

Complainants

Appellants ~~was~~ assigned nine cross errors. The first ^{was} ~~is~~ that

the Circuit Court should have found that the money was retained by

Staley at Mrs. Owens' express request. ~~With the finding of the Court~~

~~was not in these exact words, that was the substance of the finding and~~

~~the relief granted was based on that theory.~~ The second and third ^{was} ~~are~~

that the Court did not charge the Staley estate with interest on all

the funds while the same were in his hands.

We are aware of no rule requiring a trustee to account for any

interest on a trust fund except such as he receives therefrom, even

where he mingles the trust fund with his own, provided he always has at

his command funds with which to respond to all legal demands. Estato of

Schofield 99 Ill. 513, Meek etc. vs. Allison et al 67 Ill. 46.

Mayer v. McCracken 245 Ill. 551, 554.

^{was} The fourth ~~is~~ that a credit of \$500 was erroneously allowed

defendants ~~appellants~~ upon the evidence of a draft for that amount dated December

29, 1890. The draft referred to was one of the Laomi Bank payable to

Mrs. Owens and endorsed by her, but there ^{was} ~~is~~ nothing in the record in

any way connecting Staley or the funds of Mrs. Owens in his hands with

it, or to show from what source it was received.

^{was} The fifth ~~is~~ that a credit of \$600 was allowed appellants upon

the strength of a letter dated May 13, 1889. The letter in question was

one written by Daniel Staley to some nephew and is as follows:-

" Lacle, May 17, 1937.

Dear Nathan:-

You will find enclosed a draft on St. Louis for \$500 as your mother directed. I and Turpin was at Springfield today and settled up for the land. I let him have \$1600 and I don't think I will have any trouble to loan the balance. x x x".

complainants
It was introduced by ~~unreliable~~ ^{complainants} for the purpose of showing the fact that Staley had received the proceeds of the sale of land that he consum-

~~mated and that he contemplated loaning the same, that that check refer-
ring to the fund sent to Nathan is not "savings", as the bank, and at
that does not even tend to show that the money sent came out of the
fund received from the land. We find no competent evidence in the
record tending in the least degree to support the finding of the
Circuit Court that either the \$500 mentioned in the fourth assignment
of cross errors or the \$500 mentioned in the fifth assignment of cross
errors should be allowed as a credit in settling this account.~~

was
The sixth ~~is~~ ^{was} that a credit of \$1600 was erroneously allowed
defendants
~~complainant~~ ^{for} a payment of a mortgage on the real estate sold in 1893
for a consideration of \$4160. ~~To think the brief fully warrants that~~

~~finding.~~

cpl The seventh ^{is} that the evidence of Daniel P. L. should have been excluded except in the same amount to which it is a direct interest.

< Staley was not a competent witness in his own behalf except in so far as the exceptions to Section 2 of Chapter 21 R.S. apply. Whether any of his testimony was improperly admitted is, however, in our view of the case wholly immaterial, for the reason that there is nothing in it that apparently was considered by or for any court with the Court to the detriment of appellees.

The ninth ~~is~~ error is alleged ~~is~~ that the decree did not require appellees to pay \$10,448.77. There was no evidence to warrant such a finding.

For the reasons given the decree of the Circuit Court is affirmed in all respects, except as to the credit of \$500 allowed as of December 23, 1890, and the credit of \$500 allowed as of May 17, 1891, and it is reversed as to those two findings and the case is remanded to the Circuit Court with directions to enter a decree in all respects the same as the former decree, except as to the two credits mentioned, which shall be disallowed. Affirmed in part and reversed in part and remanded with directions.

FILED
General Number 669.

October Term, 1914. Agenda No. 10.

Thorn on Akers

Appellee,

vs

Cleveland, Cincinnati, Chicago

& St. Louis Railway Company,

Appellant.

APPEAL FROM THE CIRCUIT COURT

OF COLES COUNTY.

G. WIS J.

This is an appeal from the judgment of the Circuit Court of Coles County for \$100.00 against appellant.

The suit was originally in case but was changed by leave of Court to assumpsit before judgment.

The declaration as amended bases appellee's right to recover on a failure of appellant to perform its contract with appellee to furnish him by a certain time a car of specified dimensions in which to ship logs from Mattoon, Illinois, to Indianapolis, Indiana. The case was tried by a jury and resulted in a verdict for appellee on which the judgment appealed from was based.

Appellant has argued three reasons only why the judgment should be reversed. First, that the verdict was manifestly against the weight of the evidence; Second, that the Court refused several ~~xxxxx~~ instructions requested by appellant, and Third, that by the Interstate Commerce Law the contract sued on was void.

We have carefully read the evidence offered by the respective parties, and while it is conflicting in some respects, we feel that the jury was warranted in reaching the verdict returned. Certainly the verdict was not so manifestly contrary to the weight of the evidence as to warrant this court in setting it aside for that reason.

The refused instructions complained of were framed on the theory that the issue being tried was whether appellant exercised due diligence to furnish the car ordered within a reasonable time. No such issue was before the jury. The sole basis of appellee's claim was a contract to furnish a certain kind of car by a certain time. If appellant made the contract

charged, and the same was valid, it was its duty to perform it as made. Failing in this, the law holds it liable to respond in damages for such failure. Whether it diligently attempted to perform the contract or whether it furnished the car in question within a reasonable time is wholly immaterial. The instructions complained of were properly refused.

There is one conclusive reason why the contention that the contract sued on is void under the Interstate Commerce Law cannot prevail here.

It nowhere appears that the question of the validity of this contract was presented to the trial court during the trial of the case. On the contrary it appears that ~~the~~ counsel who tried the case in the Circuit Court did so on the theory that, if the contract was made, it was a valid one.

The declaration was not demurred to; the plea was the general issue. The evidence offered by appellee of the making of the contract was not objected to; appellant offered evidence tending to show ~~that~~ the contract was not made, and some of the instructions which appellant asked the Court to give were drawn on the theory that the question for the jury to determine was whether the contract sued on was in fact made. The first motion for a new trial contained nothing involving this question.

Afterwards, apparently after new counsel came into the case, a new motion for a new trial was filed in which it was assigned as a reason why it should be granted, that the court erred in admitting evidence of the contract in question, because it was unlawful. The evidence complained of having been admitted without objection, the trial court properly denied the motion.

The question of the invalidity of this contract is evidently an afterthought. A party who is participating in the trial, and who calmly sits by and hears incompetent evidence introduced without interposing any objection thereto, can not afterwards, either on motion for new trial or on appeal be heard to complain that it was admitted. Lechleiter v. Broehl 17 Ill. App. 490.

Snyder v. LaFranboise 1 Ill. (Breese) 343. Merchants Despatch

Tr. Co. v. Jeesting, et al., 89 Ill. 132.

Deitrick v. Waldron 190 Ill. 115. Ranson v. Mc. Carley 140 Ill.
626.

Finding no reversible error in the record, the judgment of the Circuit Court is affirmed.

Judgment affirmed.

FILED

201-16
1915

Chas. R. Healey
Clerk of the Court

GENERAL NO. 6334

APRIL TERM 1915.

ACTED TO.

MICHAEL COSTELLO, and
RICH COSTELLO, Partners
doing business under the
firm name and style of
COSTELLO BROTHERS,

Defendants in Error,

vs.

F. A. DELANO, W. K. DIXBY, E. B.
PRYOR, as Receivers of the
EASTERN RAILROAD COMPANY,

Plaintiffs in Error.

ERROR TO THE CIRCUIT COURT
of Hamilton County.

Graves J.

A suit in assumpsit was begun by defendants in error against plaintiffs in error in the Circuit Court of Hamilton County to recover compensation for railroad construction work, performed under a contract in writing only executed by the parties. The declaration, first filed consisted of one count in which the contract relied on is set out in full verba. After the verdict and before the judgment two additional counts were filed. The first additional count declared for money due upon an account stated and the return was for work done and materials furnished. In connection with these additional counts notice was given that plaintiffs relied on the contract set out in the original declaration filed. *The defense was*
The defendants filed seven pleas. First, the general issue; second, that T. P. McDonough who had been the engineer on the ground in charge of the work for defendants and who had made monthly returns

and a final estimate of the work done, had no authority to make such final estimate; third, that McDonough was not appointed by A. C. Cunningham, the chief engineer of defendants as his agent or placed in charge of the work with authority to direct how it should be done; fourth, that McDonough was not authorized to make a final estimate of the work done and that he made no estimate intending it to be a final estimate, and that in making the estimate he did make he made a mistake in the amount of work actually done, a demurrer to this plea was sustained; fifth, that McDonough had no authority to make a final estimate, and that the pretended estimate he did make was fraudulent; sixth, that McDonough was not authorized to make a final estimate, that the estimate he did make was not made as a final estimate upon the authority of Cunningham, and that it was made by McDonough in wilful disregard of duty; seventh, set off with bill of particulars. Parts of fifth and sixth pleas were stricken as surplusage. The case was tried by a jury which returned a verdict for the plaintiffs for \$11,447.95. A writ of ^{of} ~~restitution~~ ^{restitution} \$121.95 was filed by plaintiffs and judgment was rendered against defendants for \$11,316.63 which included interest from the date the verdict was found. To reverse this judgment the defendants below have sued out this writ of error.

[The defense was framed and
on part of the engineer

3.

[The evidence disclosed that when work on the contract was commenced it was in charge of one T. G. Turner an assistant engineer

in the employ of ~~plaintiffs in error~~ ^{defendants} 1. Shortly thereafter he left the job and T. P. McDonough another assistant engineer, was placed in charge

that from month to month while the work progressed Turner should be in

in charge, and McDonough for the rest of the time until the work was

completed, prepared and submitted to ~~plaintiffs in error~~ ^{defendants} 1 estimates of

the amount of work done, which estimates were accepted and ~~plaintiffs in~~

~~plaintiffs~~ ^{plaintiffs} error were paid the amounts shown by such estimates to be due them by

the terms of the contract; that the work was completed about December

22, 1912 and was afterward accepted. The contract among other things

provided "that upon completion and acceptance of the work under this

contract, a final estimate shall be issued for the same and the ten

per cent previously retained, paid in full." The evidence further showed

that shortly after December 22 McDonough prepared and submitted to ~~plaintiffs in error~~ ^{defendants}

a final statement of the work done by and the amount due ~~plaintiffs in error~~ ^{plaintiffs}

~~defendants in error~~ ^{plaintiffs}; that this was the only final statement ever sub-

mitted to them, and that some time after this final statement was sub-

mitted Cunningham wrote a letter in which he said "x x x Costello]

Brothers ~~(defendants in case)~~ have been furnished with final figures showing work done by the various sub-contractors between Gordon and Doug which figures are as returned by Mr. McDonough."

It ~~is~~^{was} ~~fin~~^{an} argued that McDonough has no authority to make this final statement, that under the contract only Cunningham the chief engineer could make it.

The contract contains among other things the following provisions:-

Whenever in this contract the term 'engineer' is used, it is understood to mean the chief engineer of the receivers, or his duly authorized agents, limited by the particular duties respectively intrusted to them." x

"On or about the first day of each month, during the progress of this work, an estimate shall be made by the engineer of the relative value of the part of the work done up to such time, and upon his certificate of the amount being presented to the proper official of the receivers, or such disbursing agent as the receivers may appoint, the amount of said estimate, less a retained 10% and less previous payments, shall be paid to the contractor on or about the twentieth day of each month at the nearest disbursing office. and provided further that upon completion and acceptance of the work under this contract, a final estimate shall be issued for the same and the ten per cent previously retained, paid in full."

X X X X Y Y X Y T Y X Y T Y X Y V I Y T Z T X T X T X Y Y Y Y X E = 7

["In the foregoing specifications, it is expressly provided that the chief engineer of the Wabash Railroad is in charge of the work, and he may appoint such assistants as he may select; whenever the specifications refer to the judgment, direction, decision, approval etc., of an employee of the Wabash Railroad, they design to and mean that the chief engineer or one of his assistants is intended and referred to. The decision of the chief engineer shall be final as to the intent and meaning of these specifications." x x x x x x x x x x]

We think the contract must be construed to mean that the chief engineer of the Wabash Railroad or his authorized agent or assistant shall make the monthly estimate of the work done up to that time and also the final estimate upon the completion and acceptance of the entire work. The parties so construed and acted on that part of it which applies to monthly statements, which the contract expressly says shall be made by the engineer, and we can conceive of no possible reason why that part of it relating to the final estimate which the contract merely says "shall be issued" without particularly specifying by whom, should be given a more strict construction, particularly in favor of the party who worded the contract. Plaintiff in error also submitted to the jury in this case by plain evidence and instructions the question whether Mc Donough was guilty of a wilful disregard of duty in having his esti-

mate show that defendants in error had performed more work than they had in fact done. He could not well be guilty of a wilful disregard of duty in showing by his statement more work done than was in fact done, unless it was his duty to make the estimate. McDonough was the assistant engineer on this particular job at the time it was completed, and we think his final estimate was all the final estimate the contract called for, and that it is binding on plaintiffs in error unless the same was inaccurately or fraudulently made.

In *Wesland v. Dunham* 60 Ill.233 it was held that when parties by a contract select a person to make a computation they are bound by his computations, unless the same is impeached for fraud or mistake, and that in an action at law it could only be impeached for fraud. The burden of proving fraud in the making of the final estimate was on plaintiffs in error. The verdict of the jury against plaintiffs in error was a finding that it was not fraudulently made. We have carefully examined all the evidence and cannot say that the verdict is not supported by the weight of the same.

It follows that in sustaining the demurrer to the fourth plea and in denying the action of plaintiffs in error for a peremptory in-

instruction the court committed no error. That has been said also in cases of the plea of set off.

Plaintiffs in error have expended a very considerable portion of their argument on a discussion of the question of the correctness of the rulings of the court on the admission and exclusion of evidence. The errors in this respect complained of are numerous. We have examined them all with care. A discussion of each of them would be a useless expenditure of time and space and would require the reiteration of the most elementary rules of evidence. The correctness of some of them is shown by what has already been said and as to the balance we think the court was clearly right. The most critical consideration of them fails to disclose any prejudicial error.

[The first given instruction complained of unbounded the rule that evidence that the amount of work certified by McDonough was greater than that actually performed, or that he acted in accepting or rejecting work, would not impeach his final estimate for fraud. The objection urged to this instruction ^{was} that it assumed that the estimate made by McDonough is a final settlement within the meaning of the contract.]

< The instruction is not subject to that criticism. It assumes no more than the plea under which the evidence referred to was admitted.

Even if this instruction could be construed as assuming the

matter complained of, the first instruction given at the instance of defendants in error and the second and fifth instructions given at the instance of plaintiffs in error would obviate any harm that might otherwise have resulted from such assumption, for they expressly and repeatedly direct the jury to disregard any expression in the instructions that seemed to be an assumption of fact.

Neither does this instruction announce that the evidence therein referred to was not to be considered by the jury as contended, but in effect says that this evidence alone would not be sufficient to establish fraud. That is a correct statement of law as applied to the evidence referred to. Snell et al. v. Brown 71 Ill. 142.

The fact if true that defendants in error had not introduced any evidence to show that the difference between McDonough's estimate and that made by some other engineers was due solely to error in computation or mistake in judgment has nothing to do with the correctness of this instruction. If errors were made in McDonough's final estimate it was for plaintiffs in error to show by the proof that they were fraudulently made, not for defendants in error to prove that they were innocently made. Fraud will not be presumed from mere proof of mistake.

It is lastly urged against this instruction that it is in conflict with two instructions given at the instance of plaintiffs in error. There is no such conflict. The two referred to as given at the instance of plaintiff in error are based on a wilful disregard of duty by McDonough. That question is not involved in the one complained of. Besides that, even if a correct instruction given at the instance of defendants in error is in conflict with incorrect ones given at the instance of plaintiffs in error, it would not be a matter of which they

~~could complain.~~

[The next instruction complained of ^{told} ~~that~~ the jury
in substance that 'fraud is never presumed and that when any
transaction is equally capable of two constructions, one that
it was honest and one that it was dishonest, it will be presumed
to be honest. ~~The identical instruction complained of was ap-~~
~~proved in Schroeder v. Bach 125 Ill. 403-410.~~

An instruction on the measure of damages is
also complained of. ^{Defendants claimed that} ~~Plaintiffs~~ ^{have} ~~in error~~ ^{had} be-
cause it assumed that the estimate made by McDonough is a
final estimate under a fair construction of the contract; because
it assumed that the final estimate shows that 774,540 cubic yards
of earth had been moved by defendants in error; because it ^{told} ~~assumed~~ the
jury that ^{plaintiffs} ~~defendants~~ ^{told} ~~in error~~ ^{plaintiffs} ~~plaintiffs~~ ^{plaintiffs} receiving pay for 126,274 cubic
yards and because it informed the jury that ~~defendants~~ ^{plaintiffs} ~~in error~~ were
entitled to recover interest on such amount as was found due them
on the contract sued on.]

What has already been said in disposing of
the objections made to the first instruction, that the court assumes that

the estimate made by McDonough was a final estimate by a fair construction of this contract applies to the same complaint made to this instruction.

There was no controversy over what the final estimate of McDonough showed was the amount of yardage of earth moved, and the court had the right to treat that amount as proven to be the amount estimated by McDonough and that is all that is required in regard to the amount.

Plaintiffs *led*
The defendants in error ~~and~~ admit receiving pay for moving 196,834 cubic yards of earth, and the court had the right to tell the jury so. Even if it were error to do so, it is not an error that could by any possibility have harmed plaintiffs in error.

This contract was in writing and a person who is entitled to recover on a contract in writing is entitled to recover interest thereon at 5 per cent per annum on such amount from the time it became due. Bauer v. Hurdley 227 Ill. 319, Conrad Apartment House Co. v. O'Brien 228 Ill. 360 Dick v. Sherwood Lumber Co. 157 Ill. 325.

The eighth instruction given at the instance of defendants is criticised for numerous reasons, the most important of which have been discussed in disposing of objections to other instructions. As to the

balance of such objections, it is enough to say that the instruction is not subject to them.

Plaintiffs in error presented to the Court thirty instructions.

Of those refused the larger part of them were based on a misconstruction of the contract and were properly refused. There are a few of them that might well have been given, but on examination of those given we find that all proper propositions involved in those refused were presented to the jury in those given.

It is not error to refuse to repeat propositions contained in instructions already given.

It is lastly urged that the Court erred in denying the motion of plaintiffs in error for a new trial based on newly discovered evidence.

Before a motion of that character can properly be allowed the party urging it must show that he has exercised diligence to find out: first, what the true facts are that it will be competent and necessary to establish by his proof in order that the court and jury may be fully advised as to the real merits of the controversy; next, who knows these facts; next, where the persons are who know the facts; next, to obtain the presence of such persons in court as witnesses at the trial or to procure their depositions. In other words to show that he has done all



things that diligence measured by the standard of an interested party will suggest may be necessary to be done in order that justice may not miscarry. If a party fails to do those things, and he suffers by it, he cannot complain, and the court will leave him where his lack of diligence has placed him. The duty to exercise such diligence is on the party himself. He may delegate it to others if he chooses, but if he does, their acts are his. If they are incompetent, careless or indolent and fail to do what the law requires shall be done, and he suffers by reason thereof, he must bear the loss. [Whether diligence

was exercised by ~~plaintiff~~ ^{defendant} to discover before, and to produce at the trial, the evidence ~~they~~ ^{claimed to be} ~~was~~ ^{to be} material and which they ~~say they have~~ ^{was} newly discovered ~~is~~ ^{was} shown by the affidavit of one Harold Lane, filed in support of the motion for a new trial. ~~That~~

~~That~~ ^{ad} affidavit shows that he was the chief clerk under A. O. Cunningham the chief engineer for ~~plaintiffs~~ ^{defendants}. There ~~is~~ ^{was} no showing that he was qualified to determine what would be competent or necessary evidence in the case, or that he ever before the trial advised with anyone to find out what evidence would be competent or necessary. ~~He~~ ^{was} ~~asked~~]

he "had charge of securing Affidavits and the production of witnesses for the trial of said cause x x x". "x x x that he produced upon said trial and caused to be present at said trial all witnesses whom at that time he believed were necessary or material x x x". It ~~is~~ ^{was} not shown that he produced at the trial all the witnesses that ~~plaintiffs~~ ^{defendants} ~~is error~~ or their attorneys thought were necessary. ~~It was negligent to submit the preparation of a case for trial to such a person. He~~ further ~~says~~ ^{stated} in his affidavit that on the trial one W. G. Turner testified that he had made certain "Record Books" that were not produced at the trial, that he telephoned to a draftsman in the office in which he himself was chief clerk to have search made in that office for those record books. The affidavit failed to state whether the record books sought for were found or not. ~~So far as the affidavit here I can say have known at the time where the books were, and they may have been delivered to him at the trial in time to be used as evidence if there was anything in them that was competent or material. The affidavit failed to show how these books were competent or necessary evidence, or what evidentiary matter was contained in them.~~ The books may not have been found. If they were not, it should have been set out in the affidavit and their materiality disclosed, as well as that there was

~~at least a chance that they would be produced at another trial.~~ He

further stated that at the trial it was disclosed that McDonough claimed

to have made certain original field notes for cross-section and other

work, and returned them to the office of the chief engineer in which

office Lane was chief clerk; that he, Lane, then had no "reasonable

opportunity" to have a search made for such books and did not make a

search for them. It ^{was} not shown how these books are material or what

they would show or that they ^{could} be produced at the next trial, or what

the facts were from which he concluded he did not have a reasonable

opportunity. He next ^{stated} says in his affidavit that he did not know where

John W. James and Harry E. Adams were until after the trial or that

they were material witnesses or what they knew or would testify to, but

he ^{did} not ^{state} ^{defendants} say that ~~witnesses James and Adams~~ and their attorneys did not

know all about them and what they knew and would testify to.

~~Admitting that James and Adams are material witnesses and
that the records and field notes would be competent evidence, in the
absence of proof that plaintiffs in error and their solicitors were
ignorant of the existence and whereabouts of these witnesses, books~~

and records, it cannot be held that what the witnesses would testify to or the books would show is newly discovered evidence. The motion for a new trial was properly overruled.

Finding no reversible error in the record, the judgment of the Circuit Court is affirmed.

Judgment affirmed.

201-24

Genl. No. 6345

April term 1915

Agenda No 6

The People of the State of Illinois,
-vs-
Emilio Canutto
Defendant in error
Plaintiff in error

WRIT OF ERROR TO THE CIRCUIT COURT
OF CHRISTIAN COUNTY

GRAVES J.

Plaintiff was indicted, tried and convicted upon ten counts for selling intoxicating liquor in anti-galoon territory, and was sentenced to pay a fine of twenty dollars on each of the ten counts and to pay the costs.

He prosecutes this writ of error and asks a reversal of that judgment because the evidence does not support the verdict as to the number of sales that the jury found him guilty of; because the court gave improper instructions on the part of the people and refuses proper instructions offered by the defendant, and because "the town of Taylorville was voted dry by women votes and therefore is not dry territory."

The only evidence offered in this case on the number of sales made and the character of the beverage sold was produced by the people. The jury heard that evidence and found him guilty of having made ten sales of intoxicating liquor. We have carefully read the evidence. It amply supports the verdict.

Only part of the instructions given in fact only part of those complained of are abstracted. It is well settled law in this state

that a court of review will not consider assignments of error based on the

rulings of the trial court upon instructions, unless all the given in-

structions are incorporated in the abstract. People v. Neil 243,

208-214, and cases there cited. McClure v. Putnam 142 Ill. Appl 497,

Plaintiff in error has attempted to divorce the contention that the town of Taylorville is not dry territory because the proposition that it should be dry was carried by the vote of the women, from the question of the constitutionality of the suffrage act by urging that the right to vote on that proposition is not within the ~~terms~~^{terms} of the act, their precise point being that "towns" are not political sub-divisions of the state.

We think that question has been clearly settled by our Supreme Court by what was said in the cases of Scrawn v. Czarnecki 264 Ill. 305, and People v. McBride 234 Ill. 146.

As we understand what was said in the Czarnecki case it amounts to a holding that women may now vote on all questions of public policy, concerning which there is ~~not~~^{no} constitutional prohibition, and which are submitted to the people to determine by popular vote under the provision of acts of the legislature, because as to such questions the will of the legislature is paramount. In other words that the suffrage act is broad enough to permit women to vote on all questions except those where the constitution has prohibited the legislature from extending to them that privilege.

What was said in the McBride case seems to settle the proposition that in passing the local option act, including the right to submit to popular vote what shall be dry territory, the legislature were dealing with a subject concerning which the powers of that body were in no way limited by constitutional provisions, and were therefore, supreme.

The judgment of the Circuit Court is therefore affirmed.

Judgment affirmed.

6367

April 1, 1915

201-44
Fenton, Ill.

JAMES A. JORDAN AND CHARLES A.
JORDAN,

Appellees.

vs.

WILLIAM A. JORDAN, Jr., et al

In appeal of Nettie B. Jordan,
Chloa May Jordan, James Elaine
Jordan, Geneth L. Jordan, William
McKinley Jordan, Homer Jordan, by
Frank Lindley, his guardian ad
litem,

Appellants.

WILLIAM A. JORDAN, Jr. Andrew Jordan died June 22, 1901, intestate.
He left a widow and five children. He was at his death possessed
of 880 acres of farm lands, a house and lot in town, a vacant lot
in suburb of Chicago, and personal property to the value of about
20000. The land was incumbered for about 45,000, and there was
a considerable amount of unsecured indebtedness.

In his will he named his sons James A. Jordan and
Charles A. Jordan as his executors and gave to them his entire
estate, in trust for certain specified purposes. He also pro-
vided for the appointment of other trustees to carry out the
trust in case of the death of those designated. The provisions
of the will, so far as ^{the} ~~the~~ same relate to the question here in-
volved, are as follows:

"5th. That after said incumbrances are paid in

full, and all the liens against said lands shall be fully paid and discharged, my said executors shall continue to pay the taxes and insurance and keep up the reasonable and necessary repairs and shall then divide the income from said lands which they shall continue to rent in the manner aforesaid, among my children share and share alike, and in case of the death of any one of my said children, the same to be paid to the heirs or in case of minority, to the legal guardian of such child or children share and share alike ' ' '

Wtth: (' ' I have advanced considerable money and may still expend more for the education of my grandson, Orvis Jordan, for which I have taken his promissory notes and will take such notes for further advancements, and it is my will that he pay the same to my executors and that in default of his paying the same that the amount due on said notes shall be deducted from any money that may eventually go to his father William Jordan, and that such sums so deducted, shall be distributed equally among all my children, share and share alike and in case of the death of any of my said children leaving children surviving him, that the

children of such deceased parent, share and share alike.

It was not until after April 20, 1912, that the debts of the estate were finally paid. In the meantime and on February 4, 1912, William E. Jordan, the father of Lewis E. Jordan died leaving eight children, never having received, and never having been entitled to receive anything from the executors of his father's estate.

On April 1, 1913, the executors as trustees, filed their report in which they represented that all debts and obligations of the estate had been fully paid and that they had in their hands \$3207.07 which they asked the court to order distributed. The court ordered the distribution of this fund and among other things directed that three items due the estate amounting to the total sum of \$ 2731.63 including interest to the date of the report should be charged to the children of William E. Jordan, deceased, jointly.

One of these items, amounting to \$451.60 including interest, was a debt due the estate by William E. Jordan for money paid by the executors on notes given by him and signed by the testators as surety.

Another was for 1932.87 including interest, which Orvis Jordan owed the estate for money loaned to him by the testator and paid on notes he had signed as surety.

The other was for 1347.30 including interest, for money lent by the trustees to Nettie M. Jordan, Chloa May Jordan, Leoth L. Jordan and James M. Jordan, four of the children of William M. Jordan at the time of the funeral of their father for which they gave to the trustees their joint promissory note.

From the decree ordering the trustees to deduct pro rata these three items from the shares of the rents and profits accruing from the real estate to the children of William M. Jordan, deceased, this appeal is prosecuted:

The part of the decree particularly referring to the first and second items mentioned is as follows:

"The court further finds that under the will of Andrew Jordan, deceased, as construed by the decree filed in this cause at the ¹¹April 1904 term, that the said debt of William M. Jordan amounting to the sum of 1451.50 and the debt of Orvis M. Jordan amounting to the sum of \$1932.87, was made a charge against the interest of the said William M. Jordan in the estate of

said Andrew Jordan, deceased; and that upon the death of William M. Jordan, the said debt of William M. Jordan, and the said debt of Lewis M. Jordan became a charge upon the interest in said estate, of the children of William M. Jordan, and should be deducted from the share of rents and profits accruing from said estate to the said children of William M. Jordan, and should be charged pro rata against the individual shares of said children."

The decree of April, 1904, referred to in the foregoing quotation, was entered in a proceeding brought to construe this will. The portion of that decree particularly referred to in the decree appealed from is as follows:

"The court further finds that the complainants, trustees, have stated ^{an} ~~on~~ account between John M. Jordan, James A. Jordan and William Jordan, and that they have stated an account of sums due the estate by Lewis M. Jordan, of sums that will be due the estate by Lewis M. Jordan when the security debt of the said Lewis M. Jordan is paid, and that such account of Lewis M. Jordan

due the estate, is chargeable to the share of the rents and profits of his father, William N. Jordan, to be paid out of his share before he shall receive any division of such share of the rents and profits.

The decree appealed from was clearly erroneous in respect to the three items referred to. It seems to have been based on the mistaken theory that William N. Jordan had some vested interest in the estate.

His only interest under the will was a contingent life interest or estate in the income to be derived from renting the real estate, after the debts of the estate were fully paid, and he died before the debts were paid and therefore before he had any interest in the estate.

While by the terms of the will the executors were authorized to take from any moneys which should come into their hands for William N. Jordan whatever sums he owed the estate as well as the debt due the estate from Orvis N. Jordan, no direction or authority was given them to charge such debts to his heirs, or to take it from the share of the estate that was willed to them.

The contention that the decree of April 22, 1884, construed the will to authorize such a course is without foundation. That decree authorized the executors to open an account with William B. Jordan and to charge him with certain claims filed against the estate wherein he was the principal debtor and the testator was surety and also to charge him with the debt of Ervin B. Jordan, due the estate, the said debt to be paid out of his share "before he shall receive any division of such share of the rents and profits."²

When that decree was entered the court was dealing with questions concerning the rights and liabilities of William B. Jordan, who was then alive. Nothing was then under consideration or determined as to what the rights or liabilities of his children, as the residuary legatees of the share of the income that would have been paid to him if he had lived, would be.

Neither is there anything in the will or the law by which the charging of the three items complained of to the children of William B. Jordan jointly, can be justified. The entire estate of the testator was disposed of by will. Nothing passed by descent. All that any of the children of the testator took under the will was a one-fifth share of the net income of the real estate

during their life. The taking effect of even this bequest was postponed until all the testator's debts had been paid and all special bequests had been carried out. None of the testator's children who died before his debts were paid were to have any part or share in his estate.

In case of the death of any of the children of the testator, the share of the income from the real estate such child would have taken under the will, if then alive, was given to the "heirs" of such deceased child as residuary legatees. The heirs of the deceased child were to take under will of the testators and not by inheritance from their deceased parent. The word "heirs" being clearly used in that part of the will as a word of description of the class of persons to which the residuary estate was devised. ✓

What they took under the will was theirs, free and clear from any charges or deductions except their individual obligations to the estate, which of course they must pay.

The items of \$451.50 was due to the estate from William N. Jordan, deceased.

The item of \$1932.67 was due the estate from Elsie M. Jordan.

The item of \$347.30 was due the trustees from Nettie W. Jordan, Chloa Bay Jordan, Genoth L. Jordan and James L. Jordan.

These debts are part of the assets of the estate and should have been collected by the representatives of the estate from those who owe them.

If any of them can not now be collected it is not the fault of appellants, nor does it change the law or the meaning of the will. It is apparent that the debt of Orvis B. Jordan and the joint debt of Nettie W., Chloa B., Genoth L. and James B. Jordan can be collected as fast as the shares of those persons in the income from the real estate accrue to them, for the trustees have the right to apply such shares to the payment of what they owe the estate regardless of the fact that they might be barred by the statute of limitation from collecting the debt due from Orvis. *Demond v. Demond*, 154 Ill. App. 357; *Jeffres v. Jeffers*, 139 Ill. 368. ✓

The decree of the Circuit Court is therefore reversed and the cause is remanded to that court with directions to restate the account of the trustees and enter a decree directing distribution in accordance with the views here expressed.

Reversed and Remanded with directions.

General No. 6370.

April Term, 1915.

Agenda No. 24.

Charles M. Peirce,

Appellant, : Appeal from the

vs.

: McLean County Court.

William Ott,

Appellee.

Graves, J.

Appellee brought suit before a justice of the peace in McLean County to recover \$95.58 for work and labor, rendered under a contract in writing. He there obtained a judgment for \$80.08 from which judgment appellant appealed to the County Court of McLean County where a jury returned a verdict for appellee for \$76.80. What next followed is shown by the abstract in the following words:-

✓ "Motion by defendant for a new trial, order of court overruling motion for new trial, exception by defendant, appeal prayer to the Appellate Court and allowed".

An order overruling a motion for a new trial is neither a final judgment or an appealable order.

It has many times been held in this court and the Supreme Court of this state that an appellant must bring before the reviewing court, not only ⁱⁿ the record, but in the abstract of that record, everything such that is necessary for ~~that~~ court to know and intelligently pass upon the question raised by the appeal and that a court of review will look only to the abstract of the record for error. The abstract failing to show

an appealable order or a final judgment, there is nothing to reverse, even if manifest error had been committed by the court in the course of the trial.

It is quite as well settled that a court of review will always look at the record to find reason to affirm a judgment.

A reference to this record discloses that a final judgment was in fact entered on the verdict. That judgment is therefore affirmed pro forma for want of a sufficient abstract.

Judgment affirmed.

velles.

[illegible]

pellant brought this suit in the Circuit Court of Green County to recover her demand. Appellee gave notice of set-off and on the trial introduced over the objection of appellant evidence tending to prove that in handling the rents and income of his father's estate he had by mistake paid to appellant \$411.87 more than her share. He also denied making the promise upon the basis of which appellant's suit. Appellant strenuously insisted that the set-off claimed could not be maintained in this proceeding; that appellee and appellant were tenants in common and that if she had in fact received more than her share of the rent, it could only be recovered in an action of accounting.

The jury returned the ~~following~~ *following* verdict:-

"We, the jury find the issues for the defendant and decide that he owes no damages to the plaintiff in this case, in the case of the set off claimed by the defendant, we, the jury, find that the plaintiff owes nothing to the defendant. i.e., the jury, find the issues for the defendant".

Judgment was entered on the verdict against appellant in bar of her action.

The only reason urged for the reversal of this judgment is that the court erred in permitting appellee to introduce evidence in support of his claim of set-off, the contention being that the rights of the parties involved in such claim can only be adjudicated in an action of accounting.

Granting the correctness of that contention and that the Court erred in admitting that proof, the record conclusively shows that appellant was in no way harmed by it, for the jury specifically found that appellant owed appellee not on account of such claim.

Only such errors as may have been harmful to the party complaining will cause a reversal of a judgment.

The judgment of the Circuit Court is therefore affirmed

Judgment affirmed

201-48

Gen. No. 57.

OCTOBER TERM 1914.

1914.

T. J. Elzy for use of the)
 Farmers' Bank of Gays,)
 Appellee,)
 vs.)
 The First National Bank of)
 Findlay,)
 Appellant.)

Appeal from Colar.

Opinion by Thompson, J.

[This is the second appeal of this cause to this court.

The opinion on the former appeal reversing and remanding the case appears in 180 Ill. App. 711 where the facts are stated as the case then appeared, ~~and it is not now necessary to restate the facts.~~ After the case was re-docketed Fred Morrison withdrew his interpleader.

The Bank of Findlay filed a plea averring that after the beginning of this garnishment suit, Fred Morrison had begun a suit in chancery against the Bank of Findlay, the Farmers' Bank of Gays, T. J. Elzy and other named defendants, in which Morrison claimed the same money sought to be garnished, that the circuit court had dismissed said bill and that an appeal had been prayed and was undisturbed. The plea concluded with a prayer that "this suit may abate until the said cause now pending in the Appellate Court is fully adjudicated". The court sustained a demurrer to this plea. This ruling ^{was} assigned for error.]

The demurrer was properly sustained for the reason it averred the garnishment proceedings were begun before the chancery suit was started and does not show any final disposition of that case. There could have been proper ruling on the demurrer if the plea had averred a termination of the chancery suit has not been shown and no express opinion could give it.

The opinion rendered on the first appeal disposed of many questions that have been argued on this appeal and such as they are not revisable on a second appeal.

[The

On the last trial ~~the~~ plaintiff did not offer in evidence any record of any judgment in favor of the Farmers State Bank of Gays against

Elzy or of any execution or return thereon.] The bill of exceptions recites that "the within and foregoing is a true and complete certificate of evidence" x. x "containing all the evidence introduced by either party", and there is nothing in it concerning any record of a judgment or execution. In a garnishment proceeding there must be evidence of a judgment, issue of an execution and return thereon of "no property found". Bank of Commerce vs. Franklin, 90 Ill. App. 91; The Foxard Co. vs. Nancy Miller, 123 Ill. App. 483. The judgment must be reversed and the cause remanded for want of such proof and it is unnecessary to review the other questions argued at this time.

Reversed and Remanded.

Frank Halford
Appellee

John Dodot, Defonce Herbain,
Henry Herbain and Anheuser-
Busch Brewing Association.
Appellants

Appeal from Jackson.

Opinion by Thompson, J.

This is an action brought by Frank Halford against John Dodot, Defonce Herbain, Henry Herbain and the Anheuser-Busch Brewing Association to recover damages for an injury inflicted on plaintiff by Richard Brennan. The declaration avers that Dodot and the Herbains are keepers of dram shops; that the Anheuser-Busch Brewing Association is the owner of the premises in which Dodot conducted his dram shop and that Dodot and the Herbains sold intoxicating liquor to Richard Brennan causing him to become intoxicated and that in consequence of such intoxication Brennan assaulted and injured plaintiff. A trial by a jury resulted in a verdict for plaintiff for \$1,000.50 on which judgment was rendered. The defendants appeal.

Appellants insist that the court erred in refusing a peremptory instruction requested by them. The evidence shows that Brennan is a coal miner, who, on September 23, 1912 after sitting work with two other parties went to Dodot's saloon where he had two drinks of whiskey before going home to supper. After supper he returned to the same saloon where he had two more drinks of



whiskey. After that he purchased a quart of ice cream and with others went to the Herbains' saloon where he had beer to drink. The evidence is conflicting as to how many drinks he had in the Herbain's saloon, but there is positive evidence that he drank liquor in their saloon that evening. Whether or not appellee was injured in consequence of the intoxication of Drennan, caused in whole or in part by intoxicating liquor sold or given him by appellants, was clearly a question for the jury and there was no error in refusing to instruct a verdict for appellants.

It is also contended that the cutting was done by Drennan in the reasonably necessary self defence of his person and not in consequence of intoxication. The evidence on the part of appellee is that while standing at the bar drinking in the Herbain saloon, trouble arose over the throwing of a wet towel in sport by a patron of the saloon, at a companion of Drennan, which hit Drennan in the face. The evidence tends to show that Drennan was intoxicated and took offence at the action of the man who threw the towel and started out of the saloon to go home. When on the sidewalk, Drennan remembered that he had left the package of ice cream on the bar and went back after it. When he got inside the saloon there was further talk and trouble over the fact that he had been struck with the towel. There is evidence tending to show that Drennan had a knife in his hand when he returned to the saloon. The evidence

also shows that parties in the saloon undertook to eject Drennan there-
from on his return. Appellee was standing at the bar drinking and
testifies that he said to Drennan, "there is no use to have trouble here,
you know it was only done in fooling, its no use to bother over a thing
like that, keep quiet", and Drennan replied, "you will see if I don't
get you "; that appellee had his hands on Drennan's breast and that
Drennan told him to go away from him and appellee replied. " No, I will
not, I don't want to see any trouble" when Drennan replied, "I will
make you ", and that he then cut appellee in the arm with a knife.

The evidence on the part of the appellants is that when Henry
Herbain and some others were pushing Drennan out of the saloon, appel-
lee came up and pointed a revolver over some other person's shoulder
at Drennan, when Drennan got his knife out and cut the arm pointing the
revolver. His testimony is that he did not draw the knife until after
the revolver was pointed at him, and appellee testified that he did not
draw his revolver until after the parties were out on the side walk
after the cutting had been done. The preponderance of the evidence is
that the revolver was pointed at Drennan in the saloon and all the
evidence shows that the cutting was done in the saloon. We are unable
to say in this conflict of the evidence that the finding of the jury
is not justified by the evidence.

It is further contended by appellants that the court erred in

Modifying two instructions requested by them. The first is: ["The

court instructs the jury that if you believe from the evidence in this
(while not in discharge of his duty as a deputy sheriff)

case that the plaintiff, Holford, drew a revolver and pointed it at

Richard Brennan, or flourished the same in his presence, in such a man-

ner as to induce in the mind of the said Brennan a reasonably well

founded belief that he was actually in danger of receiving real bodily

injury, and that in an attempt to defend himself against said apprehend-

ed danger to his person he inflicted the injury complained of, upon the

person of the plaintiff, Holford, there can be no recovery in this case

and you should find the defendants not guilty".] The court modified the

instruction by inserting after the word "Holford" the words "(while not

in discharge of his duty as a deputy sheriff)".

The other instruction as asked told the jury if it believed from

the evidence that plaintiff unlawfully pulled a revolver on on, Richard

Brennan, so as to cause Brennan to fear he was about to receive bodily

harm etc. The court inserted in the instruction in place of the word

"unlawfully" the words "while not in the reasonable discharge of his

duties as a deputy sheriff".

The only criticism made concerning the modifications inserted by the

court is the claim that there is no evidence in the record tending to

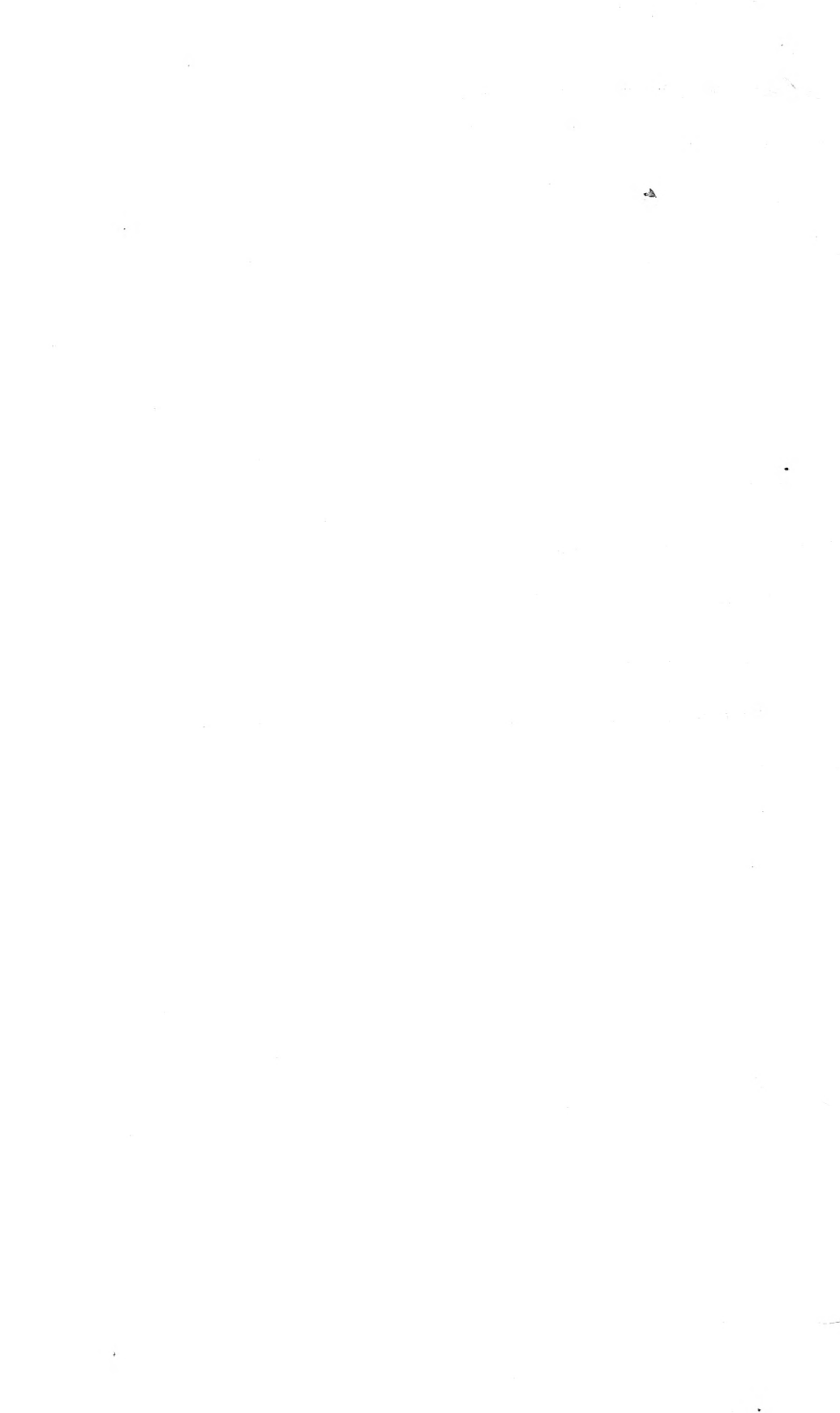
show that appellee did anything, at the time he was injured, in his of-

ficial capacity as a deputy sheriff. Appellee testified that he was a

deputy sheriff and Brennan testified that he knew appellee was a depu-

ty sheriff. Appellee also testified that he put his hands on Brennan

and repeatedly told Brennan to keep quiet there was no use of having trou-



ble . We do not think it is always necessary for a deputy sheriff to
when he is known by the parties to be a deputy sheriff to proclaim
before he does ~~an~~ act as a sheriff that he is such officer and that
he is about to ~~do~~ something as such officer. While he did not in
words say that he was acting as a deputy sheriff, the fact that he
was one and that it was known to Brennen, with what was said by ap-
pellee as he tells it, was sufficient to authorize such modification
of the instructions concerning self defence. No other objection to
these instructions as modified is pointed out by appellants.

Some criticism is also made of some of the instructions given
at the request of appellee but we find no error in them

Finding no reversible error in the case the judgment is
affirmed.

affirmed



GEN. NO. 6314

APRIL TERM 1914

AP. 1.

Millard F. Fuller by his)
Guardian, Appellant.)
vs.)
Albert H. Oettle, Appellee)

Appeal from County Court
of Calhoun County.

Opinion by Thompson, J.

An execution, issued out of the office of the Clerk of the Circuit Court of Calhoun County against Hattie A. Fluent, was by the sheriff of said county levied on certain personal property as that of Hattie A. Fluent. Millard A. Fuller claims to have given notice to sheriff in writing that he claimed to own the property levied on. There appears to have been, in the county court, a trial before jury of the right of property. The record filed does not show any action for new trial or final judgment in the county court. The appeal is therefore dismissed.

Appeal dismissed.

Gen No. 6344

April Term 1915

5

People of the State of Illinois
Defendant in Error

vs

Louis Nordine, Plaintiff in Error

Error to County Court
of McLean County

Opinion by Thompson, J.

Louis Nordine, plaintiff in error, was convicted in the county court of McLean County on the first twenty counts numbered one, two, etc. of an information charging him with unlawfully selling intoxicating liquor in anti-saloon territory in violation of the local option law. He was sentenced to pay fine of \$30 on each of said twenty counts, making a total fine of \$600 and the costs, and to imprisonment in the county jail for ten days on each of said twenty counts. The defendant has sued out this writ of error to review that judgment.

The information was filed June 11, 1914, and charges nine sales on May 24th, 1914; and ^{ent} ~~different~~ ^{several} numbers of sales on different days, the latest being four on June 4, 1914; the total number of counts being fifty four. The judgment of the court is as follows;- "It is therefore considered, ordered and adjudged by the court, that said defendant Louis Nordine, being of said judgment of guilty, be and he is hereby sentenced to confinement

in the county jail of McLean County, Illinois, for the term of ten days on each of said counts numbered one two, ^{and} X X X and

twenty of the information herein, the term of imprisonment herein mentioned being cumulative and to follow one another in said county jail in immediate succession one upon another in the order named. The jail sentence as to said second count and each succeeding count up to and including count number twenty of the information to begin at the expiration of the service of the jail sentence on the count next preceding, making in all a term of two hundred days.

[^{And now} And now, ^{said} defendant, Louis Nardine, is committed to the custody of the sheriff of McLean County, and it is further ~~considered~~, ordered and adjudged by the court that, said defendant, Louis Nardine, because of said judgment of guilty, be further sentenced to pay to the clerk of this court, to be by said clerk disposed of according to law, a fine in the sum of ^{thirty} ~~thirty~~ dollars on each of the first, second ~~and~~ ^{and} and twentieth counts of the information herein, making in all a fine of ^{six hundred} ~~six hundred~~ dollars, and also the costs of this suit, taxed at \$5.75, and in default of ^{said} payment of said fine and costs, it is ordered that, ^{The} said defendant, ^{Louis Nardine,} after the expiration of said ^{term} ~~term~~ of imprisonment, stand committed in said county jail until said fines and costs shall have been paid, ^{or} until said defendant shall have been discharged according to law.]

While it is assigned for error that the court erred

in entering up the judgment as shown by the record; and that the judgment assessing a fine of \$600 and committing the plaintiff to jail for 20 days is erroneous, the plaintiff in error, in his brief and argument, raises no question concerning and does not point out the infirmity in the judgment wherein it is held that the fine at \$600, and the twenty 10 day sentences of imprisonment "in all a term of two hundred days". The only content counsel make in their argument in reference to the judgment is on the last page thereof, wherein they say "a good class of citizens controverted plaintiff in error and the trial court was wisely & very in fixing his fine at \$600 and sentencing him to serve 20 days in jail because he was tried at a time when the agitation of the act and cry issue was at its height. The court inflicted the minimum penalties where both fine and imprisonment are inflicted. The totaling of the sentences inflicting the several penalties for each count, of which he was found guilty, is a technical infirmity or a misprison in the judgment, which does not harm plaintiff in error, and since his counsel have not presented that question this court does not feel called upon to reverse the judgment on a question that is not argued or pointed out.

While numerous errors are assigned on the record, three only are argued:- first, that the judgment cannot be sustained on the evidence; second, that the court erred in refusing to give an instruction "that the state has not proved to you by the evidence in this case beyond a

reasonable doubt that Leap Brew, ginger ale or cherry phosphate are intoxicating liquors and you cannot find the defendant guilty under such proof in this case on account of any sale or sales that he may have made of such drinks or beverages" and third, that on the examination of the jury it was developed that one of the jurors had been talked to as to his duties by a Mr. Scofield, the retary of the N. B. A.

The evidence shows that the city of Bloomington at the general city election on April 7 1914, voted on the question whether or not it should become anti-saloon territory, with the result that it became dry territory, Plaintiff in error had been running a saloon for several years and claims to have closed his saloon on May sixth and to have opened a "soft drink parlor" on May eighth. The building in which he had run a saloon and in which he opened his "soft drink parlor" was owned by the May Brewing Company.

Testimony that the plaintiff in error sold intoxicating liquors at the dates named in the information was given by three detectives named Armstrong and a resident of Bloomington named Gail. The evidence of these witnesses is that fifty four purchases were made of liquor, of which thirty were whiskey and twenty four lager beer; that they paid ten cents per drink for the whiskey and the beer was bought in bottles at fifteen cents per bottle; that the purchases were made some from a bartender named Yordy but the most of them from the plaintiff in error himself; that when the various witnesses wished to procure whiskey they called

for imported ginger ale and then they got whiskey and that when they desired beer they called for near beer and got beer in unlabeled bottles. Samples were taken of the liquor called near beer by the witnesses and an analysis of these samples showed that they were malt liquor and contained 4.47% of alcohol by volume. The evidence is that these samples were lager beer.

The defendant and his bartender denied that they had sold any whiskey or lager beer after May sixth, and a number of witnesses testified that they had bought soft drinks but had not been able to get beer or whiskey at plaintiff in error's place of business after May sixth. None of these witnesses claimed to have been in plaintiff in error's place of business when the witnesses for the people made their purchases.

The trial was had before a jury who saw the witnesses and had an opportunity to observe their manner and demeanor and judge of their credibility. The jury believed the witnesses for the people and the trial court approved of the finding of the jury. The opportunities of a court of review for determining the weight of the evidence and the credibility of the witnesses are much less than the opportunities of the jury and trial judge and a court of appeals should not usurp the functions of a jury by substituting its judgment for theirs in passing on the weight and credibility of conflicting evidence. *Leonave, McGinn*, 247 Ill. 130; *People Vs. Deluce*, 237 Ill. 541. It is only where the verdict is so palpably and manifestly against the weight of the evidence as to indicate that

the verdict is based on passion and prejudice that ⁸verdict and judgment thereon will be set aside by an appellate court. There is no evidence in this record to sustain the verdict and judgment.

Regarding the second assignment of error alleged, the evidence showed that to get whiskey the witnesses called for it by name. The name was not material. It is from the nature of the evidence that the guilt or innocence of the plaintiff in error must be determined. Temp brew is a fermented malt liquor which it is insisted has a little alcohol in it that it is non-intoxicating. The statute provides that "intoxicating liquor shall include all distilled, spirituous, vinous, Fermented and malt liquors" so that temp brew is fit in the statutory definition of an intoxicating liquor.

The court did give to the jury the following instruction:-

§ "You are instructed that you cannot find the defendant guilty of selling ginger-ale, soda-water, cherry phosphate, temp brew or any other drink or drinks that the defendant may have sold, unless you believe from the evidence that the state has proven beyond all reasonable doubt, that said drink or drinks sold by the defendant were intoxicating liquors. *It is not sufficient that the defendant sold said above drink or drinks and is not necessary or incumbent upon the defendant to prove said drink or drinks were intoxicating.*" In view of the evidence in the case and the instruction given there was no error in refusing the instruction complained of in the form it was requested.

The third assignment of error argued is that a party supposed to be pushing the prosecution had talked to a juror concerning his duties before the juror was called into the jury box. The abstract contained no reference to this matter except the assignment of error and we find no occurrence in the record such as is described in the argument. The argument also states that the juror was not accepted but was excused for cause. There is therefore no basis in the record for the assignment that plaintiff in error attempts to argue.

Assignments of error not argued are waived. No reversible error having been pointed out the judgment is affirmed.

Affirmed.

Gen. 01752

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FROM 00 1111

5. William

BOOK 331098

identiff in error

Opinion by Thomson J.

And I forget who filed it. I think it was filed by
Charles Black, member of the bar, who is a friend of mine. He
gave me a woman, a minor, without the written order of the
parent, guardian or family by law. I was tried before the jury and
defendant was found guilty. I petition for a writ of habeas corpus
and the defendant sentenced to the state prison for life,
and in default of a writ of habeas corpus, the defendant was
county jail for a period of four years. Defendant was granted a
writ of error to revise that judgment.

The penalty fixed by the statute for the offense of kidnapping is error where a convicted is liable of not less than 10 years nor more than 30 years imprisonment in the county of the offense. Section 452 of the criminal code provides, "A fine is inflicted on a person convicted of kidnapping, and the offender be admitted to bail until the fine is paid, or he be discharged according to law." Section 453 provides, "Any person convicted of kidnapping or child abduction shall be fined by the court, or be imprisoned, by the order of

the court of record in which the conviction was had, to work out each fine and costs in the workhouse or on the streets at the rate of 1.50 per day. These provisions do not permit an alternative judgment.

No authority is shown for such judgment. Judgments should be certain and the defendant should not be given the option of selecting the penalty. The court might have fined the plaintiff in error 50 and also have sentenced him to jail for thirty days but in an error to render judgment in the alternative.

[The court on its own initiative instructed the jury that "if you believe from the evidence beyond a reasonable doubt that the defendant sold intoxicating liquor to Virgil Chapman a minor x x x it is your duty to return a verdict of guilty unless you further believe from the evidence, beyond a reasonable doubt that said minor had a written order of a parent, guardian or family physician of such minor and the burden of proving such written order is on the defendant".]

This instruction required the defendant to prove a defence to the information, by evidence establishing such defence beyond a reasonable doubt. In a civil case a defence proved by a preponderance of the evidence is sufficiently proved. The instruction as given requires the defence to be proved by more evidence than would be required in a civil case. It is clearly erroneous.

For the errors pointed out the judgment is reversed and the cause remanded.

Reversed and Remanded

3-01-
4/02
4005-1

4005

502
201-78

OFF. NO. 6380

April Term 1913

A. 10.

National Trust & Credit Co.,
Appellant.

vs.

Wm. L. Van Hook.

By C. Kinnigham,
Appellee.

Continued by Thompson, J.

This is a suit in assumpsit begun by the National Trust & Credit Company of Chicago, to recover from Wm. L. Van Hook the amount of its promissory notes executed by him to the Chase and Baker Company, and by it endorsed to plaintiff. The ad damnum in the declaration is \$1,000. At the time of the trial the principal of the notes with the interest amounted \$1,029.46.

The defendant filed a special plea averring that after signing the notes, he was unable to pay his debts and on September 1, 1913, plaintiff by parol entered into an agreement with the defendant that in consideration of the defendant making to C. H. Kinnigham a conveyance of all his real and personal estate for the benefit of all his creditors, that plaintiff would release defendant from his indebtedness and that the said defendant executed such conveyance in trust, et c. A jury returned a verdict for the plaintiff on which judgment was rendered, from which the plaintiff appeals.

The evidence for appellee, who is the debtor, shows that in August, 1913, he was unable to pay his debts; that there was a meeting of some of his creditors in a law office in Danville, at which a committee's committee was appointed to try and make arrangements for the debtor to make an assignment for the benefit of all his creditors, and so on.

from his debts without taking advantage of the bankruptcy law. A trust agreement was executed dated August 26, 1913, between appellee and many of his creditors and C. N. Kiningham, trustee, in which appellee agrees to assign all his property for the benefit of his creditors in satisfaction of his debts, and the creditors agree to release the debtor from his debts. This was not signed by appellant and one other creditor. One of the creditors and an attorney, who appears to have had charge of the matter went to Chicago on September 19, to try and get the signature of appellant and other creditors, who at that time had not signed the agreement. They testify that they there talked with Rothschild, the president of appellant, showed him the trust agreement and that he said bankruptcy should be avoided and that his company ~~and~~ would sign the agreement; that he said he could sign it, but their cashier Meyer had charge of this matter and he, Meyer, would be in Danville the next week and sign it. The evidence of Rothschild is that he did not tell the committee that appellant would accept and sign the agreement, but that he said to the committee that the matter was in Meyer's hands and he, Rothschild, would not interfere with it and if Meyer thought proper to sign it, it would be signed. He says that he, for appellant, never agreed in any way to the assignment. Meyer testified that he had charge of appellant's notes against appellee; that on Sept. 29, he had a conversation with the attorney, who is a member of the creditors committee, about the trust agreement and the attorney offered him \$425⁵⁰ worth of securities as collateral to the notes to get him to agree with the other creditors, and he, Meyer, refused to do anything unless appellant got full security.

On September 27, the attorney, who had charge of the matter and who interviewed Rothschild, wrote a letter to appellant stating that the proposed trustee would call upon appellant with \$450 collateral " according to our agreement and we hope that you will sign up" On September 30, the attorney again wrote that " all the creditors have consented to the trusteeship except your account of Chase & Baker and the Osborne Company of Newark, N. J. \$32.14. We have not heard from the last named company either way regarding the account and therefore take it they will consent to the arrangement. In fact they can do nothing else since all creditors have consented to the arrangement now but two which is less than the number required to throw the matter into bankruptcy. However we are still willing to stand by the proposition to your Mr. Meyer of putting up some collateral." Again on October 3, he wrote expressing regret that appellant would not come in on the proposition. The attorney testified in rebuttal that the proposition to put up \$450 collateral was made to Rothschild by the committee on September 19, but neither the attorney nor the other member of the committee mentioned such offer, when they first detailed what occurred at that meeting. The attorney appears to have remembered it only when called in rebuttal after the letters were produced.

It also appears that while the deed and bill of sale from appellee to the trustee are dated August 26, they were not delivered to the trustee until October 25. The trustee testified that he had them recorded the day he received them.

The failure of the two witnesses to tell about the offer to give collateral

to appellant if it would sign the agreement with the facts that the trustee was offering collateral to appellee after the meeting of some of the creditors and after the meeting in Chicago, where the committee went to try to secure the signature of appellant and others, after vital asked to proceed to make an assignment for creditors; that the letter of September 30, states that the proposition to put up collateral was made to Mayo and the admission in the letter to appellant that it had not agreed to release its claim, and that the conveyances were not delivered to the trustee until October 1, with the admission that Rothschild refused to sign the agreement all corroborate appellant's contention. The preponderance of the evidence is that appellant never acceded to the agreement.

The agreement for the release of the debtor from his debt upon his making a conveyance of his estate does not purport to be an agreement to make such assignment for the benefit of all the creditors when they should all have agreed to it. ^{was} [its terms ~~are~~ between Ross C. Kiningham, debtor, "and the several persons, companies, and firms whose names and initials are hereinafter signed and affixed respectively, being creditors of said debtor, and all other creditors of said debtor acceding thereto, hereinafter called the creditors, party of the second part" and C. E. Kiningham, trustee, party of the third part] By the bill of sale, appellee transferred all the property he had connected with and belonging to the Music House, heretofore conducted by Ross C. Kiningham. It does not purport to be made in conformity with the provisions of the Bank Failure Law. The statute provides that:- "the sale, transfer, or assignment in bulk of the

major part or whole of a stock of merchandise" of value than in the ordinary course of trade shall be fraudulent and void as against the creditors of the vendor, unless the vendee, five days before the consummation, shall receive a statement under oath of the vendor giving a complete list of his creditors, and the vendee five days before taking possession shall give personally or by registered letter to each creditor a notice, etc. (Hurd's Statute Chap. 38 3, Sec 4.). The letter of September 30, gives the impression that certain of the creditors and the Kininghams were going to act on the assignment whether or not appellant and the Cacerne Company agreed to the assignment. The assignment not being for the benefit of all the creditors but only for such might accede thereto, and made without any pretense of compliance with the statute is void, (Pogue vs. Rose, 6 Ill. 157). and is not a defence to the suit sued on.

The judgment is therefore reversed and the cause remanded.

Reversed and Remanded.

Gen. No. 0363. April Term 1913.

Ag. 17.

Malcom J. Bear,
Defendant in Error,

vs.

Error to Chancery.

Edward B. Fryer, Receiver of
the Tabash R.R. Co.,
Plaintiff in Error. I

Opinion by Thompson, J.

Edward B. Fryer, Receiver of the Tabash Railroad Company, hereinafter called the defendant sued out writ of error to review a judgment rendered in favor of Malcom J. Bear, hereinafter called the plaintiff, for the sum of \$3,500 for injuries sustained by him averred to have been occasioned by the negligent operation of a locomotive engine of the Tabash Railroad Company.

The several counts of the declaration aver that between the villages of Homer and Sidney a public highway is adjacent and contiguous to the line of the Tabash Railroad. Three of the counts aver the negligent operation of a locomotive engine and the discharge of an unusual and unnecessary amount of steam from the engine and that the steam escaped from the public highway enveloping the plaintiff and his horse and making a loud and unnecessary noise, all of which frightened the horse plaintiff was driving, causing it to run away and injure plaintiff. The fourth and fifth counts aver that the defendant wilfully, intentionally and maliciously caused steam to escape from his locomotive engine with the intention of endangering the person and property of plaintiff. Some of the counts aver a duty of defendant, others have no averment of any duty of the defendant towards travellers on the highway.

The evidence shows that plaintiff is a rural mail carrier 32 years of age, who, when injured, was riding toward about three o'clock in the afternoon in a cart drawn by a gentle horse on a public highway, which runs on the north side of, parallel with, and adjacent to the right of way of defendant for about half a mile. A train of defendant came from the east on a down grade.

The evidence of the plaintiff is that there was nothing unusual in the appearance of the engine; that plaintiff saw a man at the north window of the cab and another standing in the gangway between the tender and the engine on the side next the highway; that when the engine was about 100 feet east of plaintiff, he waived his hand by way of salutation and the man in the gangway waived his hand in a similar manner; that when plaintiff was about opposite the engine's cowls one of the engine opened the mud valve or blow off cock and steam, mud and sediment shot out with a loud hissing noise across the right of way and the highway enveloping plaintiff and his horse, so that he could not see the horse, and that the steam and noise frightened the horse so that it ran away and plaintiff was badly injured, both knees of his left leg being broken below the knee. The train did not stop; the employees of the train testify that they did not see the runaway and that they do not remember about the blowing off of steam that day. Even the plaintiff, soon after the accident, was being taken to Sidney, the party taking him was met by Dr. Lazenby, the company physician coming from Sidney to attend him.

It is contended that there can be no recovery by the plaintiff in this case because there is no proof that the acts complained of were not necessary and usual, and that defendant had the right to blow off steam from its engine on its own right of way. It was a question for the jury whether defendant was either negligent or wilful in blowing off steam in the manner and at the place where the accident happened. It is said that the case of *Chandler v. Ill. Central R.R.*, 250 Ill. 359, is decisive of the contention that there can be no recovery in favor of the plaintiff. All that was said in the *Chandler* case was that the section-men had the right to roll ties down an embankment on the right of way. The ties were not rolled off the right of way onto the highway. A railroad is responsible for personal injuries caused by the frightening of a race by

unnecessary noises made in the negligent and reckless running of trains or when such noises are made in a wanton, wilful or malicious manner in disregard of a traveler's rights on the highway. C. & A. R. R. vs. Harriet, 127 Ill. 388; C. R. I. & P. P.R. vs. Stickney, 224 Ill. 540; C. R. & Q. R. R. vs. Dickson, 53 Ill. 151. The contention of defendant that a verdict could not be sustained on the evidence presented is sustained.

It is also contended that the court erred in excluding evidence offered by the defendant. Objections were sustained to a number of questions put to witnesses as to facts such as "In your experience in the operation of trains, tell the jury whether the amount of steam as shown by the plaintiff is his testimony, or whether it became frequently necessary to blow off steam and the amount of steam described was anything more than the ordinary requirements in the operation of trains from time to time?" The objections were properly sustained. It cannot be known on what the answer of the witness would be based since it would depend on how much of the evidence of plaintiff he heard and his recollection and construction of such evidence. C. & A. R. R. vs. Glenny, 175 Ill. 58; Elgin Traction Co. vs. Wilcox, 217 Ill. 41. The defendant called as witnesses the engineer and the fireman, who had charge of the engine on the day of the accident. The engineer testified that he did not remember of steam being blown off between Sidney and Homer, but that steam might have been blown off without him knowing it. The fireman testified that the safety valve was not discharged between Sidney and Homer. The engineer was asked to "tell what the condition of the pipes and engine was with reference to its use in the event of the necessity of blowing off steam and successfully operating the engine?" An objection was sustained to this question. He was then asked if he had a recollection of this particular engine with respect to its condition for proper use and safe use on that day? An objection was sustained to this question. It was error to sustain a general objection to these questions.

The witness should have been permitted to tell the condition of the engine so far as there was any question about its steaming qualities and the blowing off of steam. An objection was also sustained to a question concerning the quality of the water taken into the engine at Sidney. Counsel gave no reason for the objection and we see none. It was proper to have the witnesses describe all the facts connected with this engine and its working at that time and the engineer in charge of it. The right to tell what was proper and necessary management of the engine at that time and place. Webster Manuf. Co. vs. Mulvany, 108 Ill. 311. Hypothetical questions based on the facts proved might be asked expert witnesses as to what would be proper management under such conditions, but it must be left to the jury to make the application of such expert evidence to the case on trial. It would be proper for the witness to describe the acts of blowing off steam and under what circumstances it would become necessary to blow off steam, but it was not proper to have a witness testify whether it was or was not negligent to blow off steam at that particular time and place; that was a question for the jury to find from all the evidence whether the act or acts at that time and place were or were not negligent.

It is argued that the court erred in giving the third instruction requested by plaintiff because there was no evidence of malice. Malice does not necessarily mean an intention to injure but it may mean wilfulness may be a reckless disregard of the rights of others. There was no error in the instruction. The second, fifth, seventh and eighth instructions apply to the ordinary negligence counts and some of them instruct a verdict for the plaintiff if the jury believe certain things have been proved and some of them require the plaintiff to prove that he was in the exercise of due care.

The third refused instruction told the jury that in determining the liability of the defendant to the plaintiff the defendant must be treated not as a common carrier but an ordinary owner of land and subject to no greater degree of care than would be a private owner of real estate abutting on the highway under the same circumstances.

This is a correct statement of the law and could have been given although it is an abstract proposition.

Complaint is also made of the refusal of certain instructions requested by the defendant but on a review we find no error in the refusal of other instructions. For the errors pointed out the judgment is reversed and the cause remanded.

Reversed and Remanded.

Gen. No. 1300.

April Term 1915

20

Thomas Hart
 Appellee
 vs.
 L. L. Gregory
 Appellant

Wages Due

Opinion by Thompson, J.

Thomas Hart, Plaintiff began working for L. L. Gregory, defendant, on a farm on February 25, 1909, and remained at work on defendant's farm until March 10, 1914. This suit was brought to recover for wages. Jury returned a verdict in favor of the plaintiff for 1,344.25 on which judgment was rendered. The defendant appeals.

The evidence of appellee is that in January, 1909, appellant asked appellee if he would work for him the coming season. Appellee replied he did not know, appellant then asked what wages appellee wanted and he replied .23 a month. Not long after was said at that time. Afterwards on February 25 they met and had a conversation with reference to hiring. Appellant again asked what wages appellee would want and he replied "according to the time I would work, if it would be eight or ten months of a year"; that appellant asked what appellee wanted for a year and appellee said "twenty six dollars a month". Appellant said "it will be all right" and that appellee started to work February 25, 1909 and worked until March 10, 1914.



Further testified that he was no longer in the service in
February 1909 until February 25, 1911. On the 25th he told
him that he wanted 3 months rest for the rest of the time; and ap-
pellee asked him for how long an appellee told him he would
mon he, whatever he wanted, but if he didn't want to wait
after ^{that} to let him know and that nothing more was said. Appellee
testified that at the time of the settlement in February 1912, appellee
figured up the account, calculating it at rest at six per cent, and
found there was 961.73 due on all of that time but nothing was paid
on the account at that time.

It is agreed as soon after that 0.60 was paid to appellee
during the five years. The evidence of a plaintiff is that appellee
agreed to work for 26 per month for the first season and at the
average for the season in that not more than was paid to him, and
that after the first season there was a contract what was between them
and that appellee stayed with him five years. Plaintiff denied that
there was any settlement or work or settlement in February 1912 in
which he agreed that there was 961.73 due on all of that time and also denied that
in 1912 there was an agreement about 26 per month for the first season. He
said there never was but the one contract of work and that was the one made
in February 1909. Appellee also testified that after the first year

appellee's services were reasonably worth 10^{per} month for the working season and that during the winter season appellee's services were not worth more than his board and lodging. The court on motion of appellee ruled out the evidence as to the value of the services. Appellant also sought to prove the nature of the work done by appellee and the value of such services by other witnesses but the court sustained an objection to such evidence.

Counsel for appellee insist that "a contract is entered into by which one person agrees to perform services for another for a definite time and at a stated salary, and when services are continued after the term without objection by the employer and without any new agreement, the law raises a presumption that the parties have assented to a continuance of the services for another term of the same length and at the same salary." It follows therefore as a result of this or a similar case where services are performed after the expiration of the term the plaintiff cannot recover on a quantum meruit." This is the rule laid down in Ingalls vs. Allen 132 Ill. 374 and other cases. Counsel for appellant say they do not concede the foregoing doctrine to be sound in logic and human reason, still we recognize that courts have established it as a rule of law.

Appellant having testified that there was a contract for a fixed time at 20 per month and that it was never changed and the appellee having testified to the same rate per month, there is no room for argument or discussion as to whether the agreed rate must prevail for the entire time. "In such cases the recovery will not be on the quantum meruit but on the contract in fact by law and for the compensation provided to have been fixed by the parties". Ingalls vs. Allen (supra). There was then no error in the trial court's ruling on the admission of evidence.

If at the conclusion of the term agreed upon the employer continues to receive the services without giving notice of a

R. K.

Gen. No. 6389.

April Term 1915.

A. J. J.

F. J. Traut, Appellee,

vs.

Appeal from Schuylar.

Horace L. Winslow Co.,

Appellant.

Opinion by Thomson, J.

~~This is an~~ Action on the case brought by F. J. Traut ^{plaintiff} against the Horace L. Winslow Company ^{defendant} to recover for damages to a barge owned by plaintiff loaded with crushed rock consigned to defendant.

The barge was delivered at defendant's place of business and is averred to have been damaged by the negligence of defendant in unloading it in an improper manner and by failing to pump from the barge the water that leaked into it. ~~There was a verdict and judgment in favor of plaintiff for \$500. The defendant appeals.~~

The evidence for appellee tends to show that the barge was in good condition when it was delivered to appellant; that appellant was given instructions as to the proper manner of unloading and taking care of it and that it was not unloaded as directed but was unloaded in such a manner that the barge was strained and twisted and thereafter sank.

The evidence of appellant tends to show that the barge was old, rotten, leaky and that it was strained and twisted by appellee delivering it to appellant where the barge was to be unloaded with a steam boat under full load. The barge was moved to the corner of the barge on the bank leaving it in a tilted and tilted position thereby straining and opening its seams.

The only evidence concerning the nature of the damage is

testimony of the value of the barge when it was delivered to appellant and its value after it was unloaded; an objection to this evidence as not the proper measure of damages was overruled. The court ~~was~~ instructed the jury that the measure of damages, if the jury should find for plaintiff, was the difference between the fair cash value of the barge before and after the alleged injury. ~~Error~~ ^{was} assigned on the admission of evidence on the measure of damages and the instruction on that question.

The evidence shows that the barge had been repaired. The correct measure of damages for an injury to personal property, where the same can be repaired, is the necessary cost of making the repairs and the value of the use of such property, while the owner is necessarily deprived of it, while it is undergoing repair. *Fitz Simons vs. Braun*, 199 Ill. 398; *Berry vs. Campbell*, 113 Ill. App. 646; *Crosen vs. Chicago & Joliet Electric Ry. Co.*, 163 Ill. App. 43.

It is suggested by appellant that appellant induced the court to make the error complained of by not informing the court what was the correct measure of damages, and when appellant had proven the damages as stated over the objection of counsel that appellee then undertook to prove the damages by the correct rule and counsel again objected. From the questions asked it does not appear that the repairs asked about were confined to the damages claimed to have been caused by the negligence of appellee and that was the ground of the objection, although counsel do not appear to have been fair with the court and declined to state their position on the measure of damages. They confined their professional duties to making objections.

~~It is also contended that there was error in appellee's~~

Plaintiff's
A fourth instruction,

which informed the jury that where personal property is placed in the hands of a bailee in good condition and is returned in a damaged condition then the law presumes that the injury was due to the negligence of the bailee and the owner would be entitled to recover unless the bailee has shown by a preponderance of the evidence that it exercised such care as was reasonably necessary to care for the property. The instruction follows the rule laid down in *Reston v. Wigner*, 60 Ill. 56, for cases of bailment.

It is also argued that the court should have given a peremptory instruction to the jury to find for the defendant. We refrain from expressing any opinion on the merits of the case, for the reason the trial judge did not certify that the bill of exceptions contains all the evidence introduced on the trial. The judgment is reversed and the cause remanded for the errors on the measure of damages.

Reversed and Remanded.

Gen. No. 6375.

April Term 1915.

Act. 3.

John Kerr, Conservator of Martha
E. Kerr,

Appellee.

vs.

City of Danville,

Appellant.

Appeal from Verdict.

Opinion by Thompson, J.

This is an action brought against the City of Danville by John Kerr, conservator of Martha E. Kerr, to recover for injuries sustained by Martha E. Kerr by reason of a defective side walk. There was a recovery in favor of plaintiff for \$400 and costs.

Appellant, the City of Danville, asks a reversal of the case on the ground that the evidence does not show that the person injured was in the exercise of ordinary care for her own safety when injured, and because of the refusal of an instruction, usually given in such cases, that the law only requires a city to exercise reasonable care to keep their streets and side walks in a reasonably safe condition for the use of travellers, and that a city is not an insurer against injuries by reason of defects in its streets, etc. The instruction states the law correctly, and might have been given, but the principles announced in it were fully given in the first and fifth instructions given at the request of appellant. There was no necessity for giving and the court should not give duplicate instructions or different combinations of legal propositions already given, hence there was no error in refusing the instruction.

The evidence shows that Hazel Street extends north and south and where an alley intersects the street, the cement sidewalk had been broken for about a year so that there was a hole in the surface of the walk. The evidence is conflicting as to the dimensions

of the hole but showed it to have been from one and a half to three feet in width north and south and practically across the walk, and that it was from two and a half to six inches deep. The sand and gravel had been washed from under the surface of the walk at the south side of the hole leaving the surface of the walk projecting two or three inches over the hole. Martha E. Kerr ~~was~~ ^{was} an unmarried woman fifty three years of age, who was never very bright mentally but was possessed of little less than ordinary mentality. On the night of December 29th, 1913, between eight and nine o'clock she and her sister in law were going south on Hazel Street, when Martha E. Kerr caught her foot in the south edge of the hole, fell and was injured. The sister in law, Mrs. James Kerr, described how they were going along the side walk when the injury occurred and testified that it was dark at that place, that Miss Kerr knew nothing about the place and had only passed over that walk once before when going north about a month before the accident.

It was a question for the jury from all the evidence to say whether the party injured was in the exercise of due care, and if having found that she was in the exercise of such care, we cannot say that the verdict and judgment are not sustained by the evidence. The judgment is affirmed.

Affirmed.

Gen. S. 6332

ril 1913

J. A. Dowe and Mrs. Dowe
Appellants

vs

Paul Dunn
Respondent

Division of ...

J. A. Dowe and Mrs. Dowe

in attachment before a justice of the peace ...
for defendant appeared in the justice's court, where judgment was
against him. ... trial before a jury ...
plaintiff for 160. ...
d against defendant for 140, ...

He quit is brought to recover for rent ...

lease and on April 24, 1913 ...
named as lessee. ...
that the lease was entered by on a ...
paid three months rent on the lease and ...
trial, ...
rent under ... from September 21 to October

1913 and that J.A. Crawford was the agent of ~~the~~ ^{the} ~~land~~ ^{land}.

by the terms of the lease ~~and~~ ^{and} ~~the~~ ^{the} ~~land~~ ^{land} ~~to~~ ^{to}

lessor certain lease "for term of years and not less than 10 years

and receiving therefrom said oil and gas and the proceeds thereof

from date and as long longer as oil and gas is found thereon".

"Lessee agrees to drill a well on the premises within 60 days

from this date, or thereafter ~~to~~ ^{pay} ~~the~~ ^{to} ~~the~~ ^{the} ~~lessor~~ ^{lessor}, rentals as

in after provided until a well is completed or the leasehold is

granted is conveyed to lessors". The parties agree to drill

well on the premises within 60 days from the date hereof, or the

thereafter pays a rental of 20 per month payable in advance until

well is completed. The parties agree that the well shall be com-

pleted within 60 days from the date hereof until a well is completed.

Well at the time of the date of the lease the lessor

lease to the agent for the reason that the lease is a lease of oil

interest in land and no other is performed within a year and the

signed by him.

Well at the time of the date of the lease the lessor

question of the date of the lease was not raised on the trial and

also that the lease is for rent in the amount of \$20 per

month rental until a well is completed and the lease is

or until one year.

examined by the court.

disclose that there was any objection to the introduction of the lease in evidence on the ground that it was void under the statute of frauds, no instruction was asked on the question, neither is it contained in the motion for a new trial nor in the assignment of error. *A* defence that was not raised in the trial court cannot be raised in this court for the first time. (*Highley vs. Metzger*, 137 Ill. 237; *Tyrrell vs. Robinson*, 130 Ill. 236.) The defence of the statute of frauds is not raised by motion to direct a verdict. It is unnecessary to pass upon the other questions discussed by the parties in reference to whether or not the statute of frauds is a defence to this suit.

Appellant also contends that there is no evidence that appellees are the owners of the property leased. Appellant having accepted the lease, and paid rent upon it, the suit is on a contract accepted by him. If appellees were not the owners that was a matter of defence.

It is also contended that certain instructions requested by appellant stating in effect that if they believe from the evidence that the payments made by appellant or its agents were merely optional then they should find for appellant. There was no error in refusing said instructions. While appellant held the lease it prevented any contract being made with other parties to respect for appellant had the right under the lease to receive and release

any rights under the lease and thereby prevent the accumulation of
rents. Finding no error in the case the judgment is affirmed.

Affirmed

308

201-102

en. No. 6389.

April term, 1905

G. H.

George L. Roberts and
L. W. Barker, Appellants,

vs.

Deed from Betty.

George L. Barbee, Lattie A.
Widick, William Lane, E. L.
Dove, et al., Appellees.

Opinion by Thompson, J.

On August 22, 1901, George L. Barbee and Sarah L. Barbee, executed their note and mortgage for \$500.00, payable to the order of William Craig, five years after date. This mortgage was recorded immediately after its execution and was the mortgage sought to be foreclosed in the original bill in this suit. While this note with the mortgage was given in favor of Craig, it in fact was the property of L. W. Barker and George L. Roberts, partners doing business as Barker and Roberts. No assignment of the mortgage of record was made from Craig to Barker and Roberts but Barbee believed it to be the property of George L. Roberts for many years. This mortgage covered forty acres of land which was conveyed to Lattie A. Widick and while she owned it, she and her husband executed a note and mortgage thereon for \$500.00 to George L. Roberts; this mortgage was never recorded. Thereafter on March 5, 1909, the Widick brothers and their wives executed notes and a mortgage for \$3400.00 covering the forty acres in question and an adjoining forty, to E. L. Lane, who immediately endorsed the notes to E. L. Dove and E. L. Dove. On March 24, 1910, the two Widicks and their wives conveyed the eighty acres above

referred to, to William Baum subject to two mortgages, one in favor of George Roberts the other in favor of Eliza . . . , which said mortgages the grantee herein assumes and agrees to pay.

no money was paid by Baum in this transaction but he assumed the indebtedness and the property ~~seems~~ to have been worth less than the debt. ~~Evidence is introduced for the purpose of showing that Baum had notice of the unrecorded Roberts mortgage but it appears from the acts and transactions of all the parties that neither Baum nor the Dove brothers had either actual or constructive notice of this unrecorded mortgage. The evidence shows that the recorded mortgage to Craig was known and spoken of by the parties as the Roberts mortgage. In February, 1911, Roberts asked Baum to pay his mortgage. Baum inquired by telephone how much was due. Roberts gave him the amount, \$551.65, and Baum met him at the bank and gave him a check for that amount, receiving a note which Baum says he glanced at the back of to see the figures and put it in his pocket. He asked Roberts for the mortgage and Roberts told him he would get it and give it to him and that he would release it of record. Later he gave Baum the unrecorded \$500.00 mortgage and Baum immediately objected and said that was not the mortgage he was paying off.~~

~~This suit was brought to foreclose the Craig mortgage for \$400.00, dated August 22, 1901, and a cross bill was filed praying that the Craig mortgage be released of record and that Roberts pay~~

to Lamb and the Doves the amount paid by them in excess of the amount due on the Craig mortgage together with legal interest thereon from the date of said payment.

The circuit court dismissed the original bill for want of equity, granted the prayer of the cross bill and ordered the mortgage sought to be foreclosed released of record and it, together with the note, cancelled and that Roberts, a defendant, pay to Lamb and the Doves the sum of \$1.65 with interest from February 6, 1911.

The decree further found that on February 6, 1911, when the money was paid to Roberts and prior thereto, neither Lamb nor either of the Doves, appellees, had any knowledge of the unrecorded mortgage and the note which it secured and that said payment was made by appellees under the belief that they were paying the Craig note and mortgage.

The matters presented upon which a reversal of the decree is asked are questions of fact. The evidence was heard in open court. On a review of the record we see no reason for disturbing the findings and the decree, all of which are supported by the evidence. No reversible error appearing in the record the decree is affirmed.

Affirmed.

1171
Gen. No. 6897.

April Term 1915.

1914.

F. R. Dennis, Appeller,

vs.

Appeal from City Court of
Mattoon.

Charles R. Jones, Appellant.

Opinion by Thompson, J.

Appellee recovered a judgment against Charles R. Jones, appellant, in the city court of Mattoon for \$180, for one year's interest that was due on a \$3,000 note.

The suit was begun May 20, 1914. The declaration contained one count and avers that on to-wit the 16th day of October, 1913, the appellant and two other parties who were not served with summons, executed their certain promissory note for \$3,000 due to the order of Evan R. Tucker twenty four months after date with interest at six per cent per annum, payable annually; that afterwards on to-wit said day said Tucker endorsed said note to plaintiff; that afterwards on to-wit October 28, 1913, one year's interest became due on said note for interest from to-wit October 28, 1913, until to-wit October 28, 1914, and the day for the payment of said interest had elapsed, etc. A copy of the note was attached to the declaration.

The defendant filed a plea of the general issue with notice that the consideration for the note was a contract from Tucker to

transfer certain valuable rights to a corporation to be organized, and that the payment of the note was contingent on its performance by Tucker of his contract; that plaintiff is not the owner of the note but brings the suit solely for Tucker; that plaintiff was placed in possession of said note with notice and knowledge of the matters contained in said contract; that certain representations made by Tucker to defendant were false and fraudulent and that plaintiff was a party to said representations and concealment of Tucker.

The first error assigned that is claimed is, that the declaration is insufficient to support the judgment. The note, with its endorsement, was introduced in evidence. There is no objection that there was a variance between the note and the declaration. The date of the note is 1911, whereas a variance. It avers a year's interest from October 10, 1911, to October 10, 1912, was due and unpaid. These dates are correctly alleged. By the well known rule of pleading, dates when averred under a videlicet, need not be proved as averred. *Long vs. Corbin*, 75 Ill. 361; *Ross vs. Mutual Ins. Co.*, 134 Ill. App. 481. This



contention of appellant cannot be sustained.

[After the introduction of the note in evidence by plaintiff, defendant called plaintiff as a witness. He testified that he did

not know the makers but that he bought the note after his banker had investigated them; that he did not ask Tucker what it was given for but that the payee told him it was given for some of his miscellaneous

interests; that he paid \$1,500 in cash and transferred \$1,000 of stock at 50 cents on the dollar for the note on July 16, 1917. One

of the joint makers of the note testified that in a conversation with plaintiff a few weeks before the trial, plaintiff told him

that he held the note as collateral security for a loan. Defendant

Defendant introduced in evidence a contract between the payee and the defendant

appellant under which the payee agreed to procure certain miscellaneous

rights for a corporation to be organized and which was the consid-

eration for the note sued upon and other notes.] The contract is

still in full force and effect and has not been cancelled or re-

scinded. The notice filed with the general issue states that

Tucker failed to secure a certain contract with the National

Miscellaneous Company and failed to state that the contract between

Tucker and appellant has been cancelled or attempted to be cancelled for any reason.

The rule is that non-performance of an agreement, which is the consideration of a note, is not a failure of consideration unless the agreement be rescinded. *Moore vs. Phrasing*, 126 Ill. 319; *Smith vs. Western Trust and Guaranty Co.*, 126 Ill. App. 577; *Monahan vs. Levice*, 70 Ill. App. 69. The notice does not set up facts which, if proven, will constitute a failure of consideration. The proof made by the appellant shows that the appellee is an endorsee in good faith before maturity. Even had he simply held it as collateral security for a loan that fact of itself would not be a defence to the note unless the endorsee knew, or had notice of such facts as would put a reasonably prudent man on inquiry concerning a good defence urged against the note. There is nothing in the evidence tending to show the appellee is not a holder in good faith. There was no defence proven by the evidence and nothing to submit to a jury. The court properly instructed a verdict for the appellee.

Appellant further contends that the court erred in not in-

ing objections to certain questions asked the appellee as the witness Hays. There was no error in the ruling for the reason that the matters set up in the notice filed with the general issue do not constitute a failure of consideration. There is no error in the case and the judgment is affirmed.

Affirmed.

17-7

Gen. No. 6395.

April Term 1915.

Ac. 47.

James White and Wm. J. Brown,
Executors of Estate of Eliza J.
J. Lewis, Dec'd Appellants.

Appell' from Christian.

vs.

John S. Lewis, Appellee.

Opinion by Thompson, J.

This is an appeal by the executors of the estate of Eliza J. Lewis from an order sustaining of the marsh report and to the amended final report of the executors.

Eliza J. Lewis died testate on April 1, 1908. James White and William J. Brown, sons in law of the deceased, were appointed executors of her estate; she left surviving her son, John S. Lewis a son, Sarah S. White and Maria Brown, her daughters, Clarence Burke, a son of a deceased daughter, and three children of another deceased daughter who was the wife of John B. Colgrave. At the time of her death John B. Colgrave owed the estate \$7,500, Mrs. Brown \$3,350, Mrs. White \$4, 74, and John S. Lewis owed the estate a note for \$1,378.90 and the executors claim that he also owed the estate a note for \$600, and \$300 for rent of a house occupied by him from October, 1904, up to and until the death of Eliza J. Lewis after her death. In September, 1902, Colgrave and all the heirs of Eliza J. Lewis paid their indebtedness and a partial distribution was made. Tenant houses in Taylorsville composed about one fifth of the estate; they were not converted into cash until October, 1912. Lewis was received for a settlement

of the estate but ^{it} refused to make payments on the notes or rent that the estate claimed he owed. In December, 1913, the executors filed their first account current, which is also a final account. In it the executors charge themselves with having received among others the following items, "1913, July 13, Received on J. S. Lewis notes \$2, 038.58." "October 10, Received on J. S. Lewis house rent \$191.00" and they credit themselves with having paid said items to him.

The report shows that the executors have on hand \$319.30 for distribution, of which \$175.10 should be paid to John S. Lewis as his distributive share as a legatee under the will.

Lewis filed a number of objections to the report among which are:- (6) Item of \$700, commissions allowed the executors; (7) Item giving Lewis credit for payment of \$2,038.58 on account of notes; (8) Item \$391 House rent charged to him; (9) Item that John S. Lewis was only entitled to \$175.10 for his distributive share, and (11) That the executors fail to account for interest on money and assets in their control two years and six months after the date of letters testamentary. From an order approving the report and ordering distribution, - although the record contains no notice to the heirs and legatees, - and appeal was taken to the Circuit court by John S. Lewis.

On the hearing in the Circuit Court the eighth and tenth objections were sustained, the other were overruled. The court ordered the executors to restate the account by eliminating the sum of \$600 from both the credit on the notes to J. H. S. Lewis and the charge to him, and finding that the sum due Lewis is \$200.00 as his distributive share. The executors appeal and contend that the report as approved by the probate court was correct. Lewis has assigned cross errors in regard to the allowance of commissions and that the executors should be charged with interest under the statute.

The evidence shows that the deceased on August 10, 1903, loaned appellee \$600, by giving him a check for that amount, which he cashed, and that on September 1, 1903, he gave her his note for \$600 due in one year with five per cent interest. After that time, Mrs. Lewis claimed to have lost the note and on May 11, 1904, appellee executed a new note for \$600 which states on its face that it was given in place of the lost note. The last note was placed by Mrs. Lewis in a tin box with other securities. Subsequently the tin box and its contents were lost. On November 1, 1907, the children and sons in law of Mrs. Lewis met with her and executed

new notes to take the place of the lost notes. Appellee executed a note to his mother for \$1,731.90, the amount being indicated from data in her possession and by others familiar with the facts. The \$1,731.90 note represented the total of two notes of \$100 each, the \$500 note and a note for something over \$700, with a credit on it. A short time after the making of the new notes by the children and sons in law, the tin box with the original notes was found in a hardware store. After the box was found the children of Mrs. Lewis met with her at the residence of Culgrave, the son in law, to check up and give her new notes to represent their several indebtedness shown by the original notes in the box. Mrs. Lewis was ^{as} then 75 years of age and very feeble, and while the business was done in her presence she took little part in it. Appellee received from his mother the substitute note of \$1,731.90, the note for \$100 of date May 31, 1904, the two \$100 notes and the \$700 note, and gave her a new note for \$1,772.90. Appellee did not give his mother anything for the surrender of the notes except the new \$1,772.90 note. James White, a son in law of Mrs. Lewis and a little less friendly to Lewis, testified that he was present at the giving of

the \$1,372.90 note; that the \$500 note of May, 1934, was given up to appellee at that time and that it was not figured and put into the new note, because appellee claimed it was given in place of another note which had been found, and that appellee paid nothing at that time. Appellee was examined as a witness on behalf of the executors as to what occurred when the \$1372.90 note was given. When counsel for appellee began to cross examine him as to what occurred at the time that the \$1,372.90 note was made, and the \$500 note with the other notes were surrendered to him, he was asked if his mother assented to the giving up of the \$500 note. Counsel for the executors objected. The cross examination of appellee was proper since they were asking about a transaction concerning which the executors had made appellee their witness, although the question as asked was objectionable in form as it called for a conclusion. The court thereupon stated; "I am not going to decide whether he owes that note or not". Counsel for appellee did not ask any further questions about what occurred at that time. At another time when appellee had testified in his own behalf, on cross examination by counsel for the executors he was asked the question concerning the \$500 note, "You never have paid it have

you?" and an objection by his counsel was sustained. While this may not have been proper cross examination, and he could not have testified concerning that matter on his own motion, the fact that he objected to answering the question, when it was asked on behalf of the estate, leaves a strong inference that he had not paid it.

There appears to have been two hearings on this appeal before the Circuit Court. At the first hearing appellee was a witness, and produced the two \$600 notes and they were introduced in evidence. That evidence is in the record. At the time the executors credited appellee with the payment of his note, they surrendered to him the \$1,378.90 note. At the second hearing appellee was present in court and produced the \$1,378.90 note and had the \$600 note with him. Counsel for the executors requested him to produce the \$600 note that it might be again offered in evidence. The trial judge thereupon stated: he could not compel Levi to produce it; that the question was whether the executors ever had possession of it since they were appointed; that under section 21 of the Administration Act, the executors should have filed an af-

affidavit and cited him into the county court but that the circuit court had no right to compel him to produce the note.

The hearing on objections to a report of executors is in the nature of an equitable proceeding. It was not necessary that an affidavit should be filed under section 81 of the Administration Act to require that appellee, who was then in court and had possession of the \$600 note, should produce it that it might be offered in evidence. If appellee has not paid that note and it has not been included in some other note that has been paid or it was not given to him as a gift, he should be charged with it.

Appellee testified that when the first \$600 note was found his mother turned it over to him, and that he got the other \$600 note when the \$1,378.90 note was executed after the box was found. He also testified that he thought the \$600 note was not figured in, when the \$1,378.90 note was made, and that that note represented the two \$150 notes and the \$700 note with interest, although he did not figure the amount he owed, but supposed the new note was for all he owed.

The clear preponderance of the evidence shows that the objector still owes the \$600 note. The circuit court apparently did not pass on the question whether appellee still owes that note

or not, but appears to have decided that it had no jurisdiction over that question because there had not been a citation of appellee by the executors under the Administration Act to obtain possession of the note.

It is also contended on behalf of appellee that on the settlement of the accounts of an executor, the executor has no right to deduct from the amount due a distributee any sum that may be due from the distributee to the estate, and that the statute of limitation is a defence to the \$500 note against the estate of which appellee is a distributee. Neither of these contentions can be sustained on the facts admitted by the appellee. *Jeffers vs. Jeffers*, 179 Ill. 368; *Edmond vs. Edmond*, 154 Ill. App. 357 and cases therein cited.

Regarding the assignment that the court erred in charging \$391 rent to John S. Lewis, we see no error in that finding on the evidence now in the record. The \$1,732.00 note was not introduced in evidence, but it seems to have been before the court from an extract purporting to be quoted from it in the order of the court that that note was in full of all notes and accounts to its date. That might have some connection with the rent but it is not in evidence.

on this appeal.

The executors are subject to criticism for not filing a report at an earlier date and should have enforced a settlement with appellee but since it was the collection of a claim against him that caused the delay after the conversion of the real estate, we cannot say that they should be charged interest under the statute; that is a matter in the reasonable discretion of the court on cause shown. The estate amounted to about \$21,000, and we see no reason for disagreeing with the court on the amount of commissions allowed the executors.

The judgment must be reversed for error in sustaining objections eight and ten as against the clear preponderance of the evidence but as there may be further evidence introduced concerning the \$600 note and the rent, the cause is remanded for another trial.

Reversed and Remanded.

GEN. NO. 6409.

April Term 1915

Illinois Valley Bank,

vs.

D. L. Hershman.

Appellant
Respondent

App. al. r. p. p.

Opinion by Thompson, J.

D. L. Hershman, the defendant, gave to the Illinois Valley Bank three judgment notes payable on demand with interest at the rate of six per cent. The first is for \$1,000 and bears date October 15, 1913; the second is for \$400 and is dated December 15, 1913; the third is for \$1,000 and bears date April 1, 1914. The notes contain a provision of attorney authorizing "my attorney of any court of record to appear for me in such court, in term time or vacation, to try and defend me, and confess judgment without process, in favor of the holder of the note for such amount as may appear to be unpaid thereon, together with certain ten percent attorney's fees, and to execute all orders which may intervene in said proceedings and consent to a judgment of execution, thereby ratifying and confirming all that said attorney may do by virtue of this."

On July 8, 1914, a declaration consisting of the count in the usual form was filed in the office of the circuit clerk of Cook County declaring on the three notes. The declaration sets out only the names of the principal and interest of each of the notes. The attorney's fees are not mentioned in the declaration nor is any provision of the notes as to payment of attorney concerning attorney's fees mentioned. It concludes:- "and by an action has decreed to the plaintiff to receive of said bank the sum of the total of said sums of money to wit:- twenty six hundred eighty two

dollars and forty seven cents in said "Return" and "Return" and "Return". At the defendant although oftentimes the defendant is to be paid the sum of plaintiff of \$5,000.00

An affidavit in proper form, proving the execution of the writ, is attached to the declaration, and a copy of the writ, and a copy of the warrant of attorney.

[An attorney signed the writ in which the plaintiff asked for, and ~~the~~ *could not* deny "that the plaintiff is entitled to the sum of plaintiff in the sum of twenty six hundred sixty two dollars and forty seven cents; and that plaintiff is entitled to be paid each of the non-judicial costs of the several proceedings in said declaration mentioned, including the sum of two hundred sixty eight dollars and twenty four cents for the attorney's fees for entering up this judgment and for the other costs and charges in this behalf expended to the amount of five dollars".] ~~follow the last paragraph to the end of the case, etc., and to the end of the case.~~

no [The clerk entered the judgment in favor of the plaintiff for \$2,950.71 using the amount of the return and including the attorney's fees.]

On July 11, defendant filed a motion to quash the writ and the judgment so entered in vacation, and to quash the execution thereon, and for leave to plead to that part of the judgment relating to the attorney's fees. He gave notice that the motion would be taken up before the circuit judge. A stay of proceedings was granted until the next term of the circuit judge.



On December 3, 1914, motion was made to set aside judgment
"as to the sum allowed in said judgment for attorney's fees and costs" of \$268.24 and for cause states that the defendant was ready to pay the judgment before taking judgment. With this motion was filed an affidavit stating that defendant had paid the judgment and costs except the attorney's fees: that no demand had been made on him before the entering up of judgment and that said judgment had been entered against him because of the ill will of appellee's cashier, and the same was unnecessary as he was ready at all times to pay said note on demand.

Evidence was heard on the financial condition of defendant, his marital troubles, the removal of his account from appellee bank and other business transaction. The court does not appear to have made any ruling on the motion to open the judgment. The ^{record} proper contains no ruling on the motion. The bill of exceptions states that "Thereupon the court rendered judgment for the plaintiff and against the defendant". It is not stated what the judgment was, but the record is silent as to the ruling on his motion since they do not appear in the record.

The warrant of attorney authorized [my attorney at any time ^{thereafter} ~~to~~ to confess judgment in favor of the holder of the note for each and every note which might appear to be unpaid to person together with the attorney's fees.]

In the cognovit the defendant by his attorney signed and deny plaintiff's action and that he owed plaintiff \$1,35.47, and that the plaintiff has sustained damages on occasion of the non-performance of the several

agreements in said declaration mentioned, including the sum of \$100.00 for reasonable attorney's fees for entering up this judgment, over and above its costs and charges in that behalf expended to the amount of \$3.74.

In Hudson vs. Woods, 63 Ill. 377, it was held in a case very similar to the one in this case, that the confession was only for \$4.00, where in this case it is for \$3. The cognovit is that the defendant sustained damage to the amount of \$3. This cognovit is not a confession that plaintiff has established a claim for the amount due on the note \$2,068.47 together with attorney's fees \$208.34 and \$3. advanced for costs, but it is that defendant owes \$2,068.47 and that plaintiff has sustained damage on the basis of the non-performance of the covenants mentioned in the declaration, including the sum of \$208.34 attorney's fees for entering up this judgment, over and above its costs and charges in that behalf expended, to the amount of \$3. In this, the cognovit is for the plaintiff. The amount is to the amount of \$3.00. The clerk possesses no judicial powers but acts as a ministerial officer only. There is in the cognovit no confession for \$2,300.71. The clerk exercises no judgment as to the amount of the damages to be ascertained, and in so doing is not a judicial officer. A judgment entered by the clerk is not a judicial act and is not that conferred by the plaintiff. The court agrees in refusing to set aside the judgment so entered without authority. The judgment is reversed and the clerk is remanded with instructions to grant the motion to vacate the judgment.



1951
Gen. No. 6411.

April Term 1918.

201-114

J. W. Livergood,

Appellee

vs

} Appeal from Christian.

Stonington Coal Co., Appellant.

Opinion by Thompson, J.

This is an action in case, begun February 25, 1914, to recover compensation for damages to certain lots averred to have been caused by the removal by defendant of an underlying stratum of coal therefrom without leaving sufficient support for the surface. [During the trial it was discovered that plaintiff had misdescribed the lots and on September 1, an amended declaration was filed describing all the lots by different numbers from the description in the original declaration. Thereupon an additional plea of the five years statute of limitation was filed.] The jury returned a verdict for \$600 in favor of the plaintiff on which judgment was rendered and from which the defendant appeals.

The evidence tends to show that the lots of appellee are about two hundred feet east and eight hundred feet north of appellant's coal shaft, and that the surface began to sink in March, 1909, and kept sinking for eighteen months or two years, sinking between two and three feet and making a basin where houses stood on the lots. Appellee showed that land adjoining and between appellee's lots and the coal shaft also sank. Objection was made to the evidence concerning other land. The evidence does not show that the lands sank together. If the land sank at the same time so that it was one transaction the evidence was proper, but

unless the land sank at the same time this evidence should not have been admitted but the error was harmless.

It is argued by counsel for appellant that the evidence does not show that appellant mined coal from under the lots, the surface of which was owned by appellee. The evidence is uncertain and somewhat indefinite as to where the entries and rooms were but that one witness for appellant tends to show that an entry ran 1100^{feet} north from the shaft and 170 feet east of it, with rooms off it the length of the entry, and that there was another entry east of that with rooms off it. Other evidence of appellant tends to show that no coal was taken from under the lots. Neither party offered any surveys of the mine or evidence of the precise location of the lots with reference to the shaft. We cannot say that appellee did not prove his case by a preponderance of the evidence and that the jury were not justified in finding from the evidence that appellant's property was injured as claimed.

The only errors concerning instructions complained of are in refusing certain instructions asked by appellant. It is argued that the eighth refused instruction, which states that appellee could not recover unless the proof showed that defendant intentionally injured plaintiff should have been given. The declaration charged "that defendant contriving and unjustly intending to injure," etc. negligently mined, etc. That part of the declaration averring contriving and intending is mere surplusage and a cause of action was stated without such material part



The fifth refused instruction is that damages cannot be given for depreciation of the buildings on the premises caused by lack of repair and natural decay; while the instruction might have been given, the thirteenth instruction given at appellant's request and appellee's third, fully informed the jury of the measure of damages if it should find for the appellee, and the only evidence as to such depreciation was that introduced by appellant on the cross examination of witnesses as to the character of the improvements showing that the buildings had not been kept painted. There was no evidence as to the amount of such depreciation. There was no error in refusing instructions. The jury were fully instructed in the thirteen given at the request of appellant and there is no reversible error in the case. The judgment is affirmed.

Affirmed.



General No. 6398. April Term, A.D.1916. Agenda No. 49.

John Barnes,)	
Appellee,	(	Appeal from
vs.	(	Circuit Court
National Live Stock Insurance Company,	)	Moultrie County.
Appellant.)	

Eldr dge, P.J.

Appellee obtained a judgment against appellant for \$1015.89, in an action in assumpsit to recover under an insurance policy issued by the latter to indemnify the former against loss by death from accident, disease, theft and fire, of a certain stallion named "Gerant Imp".

A motion was made by appellee to strike the bill of exceptions from the record and dismiss the appeal for the reason that the Bill of Exceptions was not filed within the time limited by the Court for that purpose, which motion was



taken with the case. It appears that the Bill of Exceptions was prepared and tendered to the trial Judge in apt time, but that the Judge was holding Court in another county and by inadvertence did not sign and return the same to the Clerk of the Circuit Court until one day after the ~~filing~~ time for filing it had expired. Where a party has presented his Bill of Exceptions to the Judge who tried the case, for his signature within the time fixed for filing the same, he has done all he can do and will not be prejudiced by the failure of the Judge to sign it in time to have it filed within the period prescribed for that purpose. The proper practice in such an event is to have the Bill of Exceptions filed nunc pro tunc as of the date when it was tendered to the Judge for his signature. Hill Co. vs. U.S. Guaranty Co. 250 Ill. 242; Hall vs. Royal Neighbors, 231 Ill. 125; Hawes vs. People, 129 Ill. 123; Ferris vs. Commercial National Bank, 158 Ill. 237. This was done in this case and the motion must therefore be denied.

All errors assigned upon the record which are not presented and argued in the ^{brief} are deemed waived.

Keyer v. Kimmel, 186 Ill. 109; Wabash R.R.Co. v. McDougal, 113 Ill. 603; Banfill v. Twyman, 172 Ill. 123; City of Springfield v. Coe, 166 Ill. 22.

Four alleged errors are presented in the argument for appellant as reasons why the judgment should be reversed, viz., (1) the sustaining of the demurrer to appellant's first special plea; (2) the refusal to sustain the motions of appellant to instruct the jury to return a verdict for the defendant; (3) the overruling of the motion for ~~an~~ new trial; (4) the admission of certain evidence.

The Bill of Exceptions does not purport to contain all the evidence and from the examination of the same it appears that it in fact does not do so, as it is evident that the testimony of at least one witness, that of Dr. Bromley, is omitted therefrom. Where the Bill of Exceptions fails to state that it contains all the evidence introduced in the trial, the presumption will be indulged that the verdict and judgment are sustained by the evidence. C.B.& N.R.R.Co. v. People, 139 Ill.

536; James v. Dexter, 113 Ill. 654; Brown v. Clement, 68 Ill. 192.

Under these circumstances the only alleged error presented in appellant's argument which we can consider is the first one mentioned herein, that the Court erred in sustaining the demurrer to appellant's first special plea, which error arises on the record proper and does not depend upon the Bill of Exceptions.

[*Defendant's special*
~~This~~ plea in substance avers^{ed} that the policy contained a provision that the perils indemnified against do not include death from any cause where the assured does not render forthwith by telegraph or telephone to ^{defendant}~~appellant~~ notice of any sickness or accident with which any animals insured may become afflicted; that the stallion mentioned was accidentally injured on or about the 28th ~~of April~~ day of April, A.D.1914, and that the plaintiff failed to render forthwith by telegraph or telephone to the company notice of such accident, and that therefore by the terms of the policy ^{defendant was}~~appellant is~~ not liable.]

4

The plea does not aver any connection whatever between the accidental injury and ~~death~~ the death of the stallion, but ^{defendant} ~~appellant~~ urged that by virtue of said provision of the policy, the same under such facts became void, notwithstanding that the injury might have been wholly disconnected from and in no way responsible for the sickness with which the animal died, and no matter how trivial the injury might have been.

< Provisions in insurance policies are construed most strongly
< in favor of the assured and we do not think the construction
sought by appellant is a fair interpretation of the contract.

The plea should have averred some connection between the injury and the death of the stallion. The demurrer to the plea was properly sustained. Anderson Bicknell & Company v. Kaskaskia Live Stock Insurance Company (Appellate Court, Third District, not yet reported).

The judgment will be affirmed.

5



1754

704

701-125

27

Gen. No. 0436.

October Term 1915.

C. S.

Joseph Stocks, appellee,
vs.

Appeal from Moultrie.

Woodrow-Parker Co., et al,

Byron B. Burns, Appellant.

Statement.

This is an appeal by Byron B. Burns from an interlocutory order of the Circuit Court of Moultrie County overruling a motion to dissolve a temporary injunction.

On October 27, 1914, Joseph Stocks began a suit in assumpsit in the Circuit Court of Moultrie County against the Woodrow-Parker Company (hereinafter called the company), and Richard Woodrow to recover the sum of \$506.58 and on February 15, 1915, filed a declaration containing only the common counts.

On October 27, 1914, Byron B. Burns began a suit in assumpsit in said Circuit Court against Joseph Stocks to recover on a note for \$500 dated October 14, 1914, due March 1, 1915, executed by Joseph Stocks to the company and by it endorsed without recourse to the plaintiff. The declaration in this case was filed February 15, 1915, and pleads a contract made by the defendant to purchase real estate in Ohio from the company and the making of said note by the defendant, and also contains an ordinary count on the note.

On March 3, 1915, a bill in Chancery was filed by Joseph Stocks, complainant, against the company and Byron B. Burns, praying

that the prosecution of said suits at law be enjoined; that the contract set forth in the first count in the suit of Burns vs Stocks and the \$500 note sued upon in that suit be cancelled and that the \$500.48, to recover which the action at law suit against the company and Richard S. Woodrow was begun, be ordered returned to complainant.

On March 5, 1915, an order~~s~~, entitled in the Chancery case of counsel was entered on the motion for Stocks, that the two common law cases be consolidated and be referred to the Chancery docket; that the further prosecution of said cases be enjoined and that Stocks" is hereby granted leave to file a bill in Chancery concerning the matters involved in said cases x x x and other matters growing out of the same transactions. And the Clerk of this court is directed to enter upon the Chancery docket the case of Joseph Stocks vs Woodrow-Parlier Company, a corporation, Richard Woodrow and Byron B. Burns and that said cause be given a new number on said docket."

On March 26, 1915, a motion was entered by counsel for Burns to dissolve the injunction granted in this cause on the 5th day of March, 1915. On July 1d. the motion to dissolve the injunction was overruled; from that ruling Burns prayed and perfected this appeal.

The bill alleged that on October 14, 1914, the Woodrow-Parlier Company of Ohio, entered into a contract with Joseph Stocks of Lake

City, Illinois, to convey to him cert in land in said no. county, Ohio, in consideration of the payment by Stocks of \$12,000. "to be paid as follows, 1000 notes this day paid x x and the balance amounting to to be paid at office of the Woodrow-Taylor Company, Toledo, Ohio, on the 1st day of March, 1915, upon the delivery of the deed hereinafter provided for. First party upon receipt of the full purchase price as above provided for agrees that it will on the 1st day of March, 1915, execute and deliver unto said second party or such person as he shall name a good and sufficient deed of general warranty", etc. First party agrees to deliver to the grantee in said deed a merchantable abstract of title showing first party as the owner thereof in fee simple free from encumbrance of that date; second party shall have ten days for examination of said abstract and if imperfections are found first party shall have reasonable time to make corrections; it also recites that two notes each for \$600, one due January 1, 1914, the other March 1, 1914, have been executed and are a part of the purchase price.

The bill further alleges that the company named and guaranteed to Stocks that it would furnish him the money to pay for the land and that his note secured by mortgage on the land at not exceeding 5½ per cent interest was agreed to rent the land for him at \$10. per acre; that said representations were made before the execution

of the contract, were the inducement that led him to sign the contract; that appellee told the company that he had no money with which to pay for said land and would not sign said contract but for said assurances and it was only because of said assurances that appellee signed said contract; that no abstract was tendered to appellee prior to or on March 1, 1912, and appellee had no opportunity to examine said abstract; that no deed was tendered to appellee before or on March 1, and the first time appellee ever saw an abstract of the title to said lands was long after March 1, 1912, when deed and abstract were forwarded to a representative of the company at Lovington, Illinois.

It is further alleged that said appellee paid \$506.00 the amount of the \$500 note that matured January 1, 1913, believing that appellee would furnish the money to pay for said land other than the \$500 due January 1, and rent said land for 10 acres, but said company failed to do what it agreed to do and alleged that said contract was obtained by fraudulent misrepresentation made by said company to appellee before the signing of said contract; that the company after ascertaining that appellee could not carry out said written contract, instead of returning to appellee said note that was due March 1, 1912, entered judgment thereon by confession in vacation on May 28, 1913, in the name of Byron P. Burns, who is an agent of said company; that said judgment was on motion opened for

appellee to plead, and thereafter said suit was dismissed; and thereafter another suit at law was begun on October 17, 1914, by said Burns on said note due March 1st.

It is alleged that appellee "has a good legal defense to the said suit upon the said note to due on the 1st day of March, 1915", yet the company still holds ^{said} contract and it has never been cancelled; that the said contract should be declared void and said company compelled to return to appellee the \$506.86 paid on the note that matured January 1, 1915. It is also alleged that appellee on October 17, 1914, brought suit at law against said Company to recover the \$506.86 paid on the note due January 1, 1915, and "that the trial of the two assumpsit suits would bring about a multiplicity of suits and that in the suit brought by said Burns the claim against the said Woodrow-Parker Company of gross overpayment could not be set off, and that in neither suit could the contract so held by the Woodrow-Parker Company be cancelled".

Opinion by Thompson, J.

From the language in the order granting the injunction, from a motion to dissolve which this appeal has been perfected, the injunction would appear to have been granted before any bill was filed. The record however shows that the bill was verified on January 17,

and filed March 3, 1915, and the order granting the injunction was made March 5.

The order granting the injunction also consolidated the two common law cases, transfers the consolidated case to the chancery docket and gives Stocks leave to file a bill in chancery. Richard S. Woodrow is a defendant in the common law case begun by Stocks, but he is neither a defendant nor a party to the bill in chancery although the court directed the clerk to enter on the chancery docket the case of Stocks vs Woodrow-Burner Company, Richard Woodrow and Byron E. Burns. No question as to the defect of justice in the chancery suit has been raised by appellant.

Appellee in his verified bill states that he has a good legal defense to the suit on the note due March 1, 1915. The pendency of that suit is not therefore a reason for the granting of the injunction. The suit at law begun by appellee against the company and Richard S. Woodrow is under appellee's control. There is no allegation in the bill that the company has threatened to begin a suit of any kind on the contract. The injunction granted is against the appellee from prosecuting a suit begun by himself and appellant from prosecuting his suit to recover on the note due March 1, and to which appellee in his bill states he has a "good legal defense". As for the suit now pending begun by appellant

is concerned, there is no showing or claim that the legal injury of the appellee is made into. The beginning of suit at law by appellee cannot be an equitable reason for the issuing of an injunction at his request restraining him from prosecuting a suit begun by himself. There was therefore no reason for the ordering the temporary injunction and it was error to overrule the motion to dissolve it. The order of the trial court overruling said motion to dissolve said injunction is reversed and the cause remanded with instructions to dissolve the injunction.

Reversed and amended.

GABRIEL C. STAUFFER, Plaintiff in error,

vs.

THE STATE BANK OF MANSFIELD,
Defendant in Error.

Error to

Circuit Court of

Piatt County

ELDREDGE, P. J.

Defendant in error on November 5th 1914, in vacation caused a judgment to be entered by confession against plaintiff in error for the sum of \$6395.67 by virtue of a judgment note executed by the latter March 22, 1913, payable to the order of defendant in error six months after date for the principal sum of \$5300, with interest at 7 percent per annum after date until paid. The judgment includes interest and the sum of \$500 for attorneys' fees. At the February Term, 1915, plaintiff in error made a motion to vacate the judgment and for leave to plead. This motion was supported by ~~his~~ ^{defendants} own affidavit, which in substance stated that on October 28, 1914, he filed a bill in equity on the chancery side of said Circuit Court calling for an accounting by the bank with him, which bill ~~is~~ ^{was} made a part of the affidavit, and

(Page 1)

~~are~~ ^{were} true; that he verily believes upon an accounting had between himself and the bank said note ~~will~~ ^{would} be shown to be without consideration and that the bank ~~will~~ ^{would} be found to be indebted to him; that said bill ~~is~~ ^{avoids them} now pending and service has been had upon the defendants therein mentioned; that he verily believes that upon such accounting being had it ~~will~~ ^{would} be disclosed that he has a good defense to the whole of plaintiff's cause of action.

The bill of complaint referred to avers that the State Bank of Mansfield ~~is~~ ^{was} the successor of another bank known as the Commercial Bank of Mansfield; that the latter bank was conducted as a co-partnership in which William H. Firke and several other persons were associated together in the banking business as co-partners; that ~~complainant~~ ^{complainant} plaintiff in error for a number of years prior to 1897, the date of the organization of the State Bank, had been a depositor and customer of the Commercial Bank and after the latter was succeeded by the State Bank he continued to be a depositor, customer and patron of the State Bank; that for the past fifteen years said Firke has been president of the State Bank, and for ten years the defendant Burns has been cashier thereof. The bill further avers that he had had trouble in getting his pass books from the State Bank and alleges the

(Page 2)

amount of his income, etc.; that some time prior to the year 1913 the

defendant Burns told him that he had overdrawn his bank account, and certain sums of money were due and owing from him to the State Bank, and requested him to give his note for said sum; that he ~~does~~^{did} not remember nor ~~was~~^{could} he state the beginning of the transactions following the first note given by him to the State Bank; that in February, 1913 Burns, the cashier, informed him that he owed the State Bank \$5300.00 and asked him to give his note for that amount and he thereupon executed the note in question in this case; that said State Bank through Firke and Burns ~~was~~^{were} insisting that he pay said note and unless he ~~was~~^{did} pay it they ~~will~~^{would} cause a judgment by confession to be taken thereon: that he was endeavoring to learn from the State Bank and said Firke and Burns the nature of the indebtedness, and consideration for which the note was given, but the latter ~~had~~^{have} refused to make him any statement; that he verily believes said note to be without any consideration therefor.

The bill makes the State Bank, together with Firke and Burns, parties defendant and prays that an accounting ~~may~~^{be} taken of all the transactions and dealings of ~~plaintiff in error~~^{complainant} from the time he commenced doing business with the defendants, or either of them, and that upon such accounting being taken that

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such of them as ~~may~~^{might} be found to be indebted to him, ~~may~~^{might} be decreed to pay him what, if anything, ~~may~~^{might} be found by such accounting to be due him; that he ~~is~~^{was} willing and ready to pay to the defendants, or either of them, any sums of money which ~~may~~^{might} be found to be due from him to them upon said accounting; that the defendants to said bill ~~may~~^{might} be enjoined from entering up judgment upon said note, etc.

Taking the allegations of the affidavit and the bill together they show in substance that plaintiff in error believes that if an accounting be had of all his transactions with Firke, Burns, the Commercial Bank and the State Bank, it would be found that this note was without consideration. Plaintiff in error contends that the motion should have been allowed for two reasons: First, that the affidavit shows a meritorious defense to the note, and second, the suit on the note should be abated because the suit in equity was pending when the judgment was entered.

The affidavit does not show any defense to the note and the judgment will not be opened up for the purpose of permitting a plea of set off.

Pollock v. Kinman, 176 Ill. App. 361; **Tompkins v. Gerry**, 43 Ill. App. 255.

A suit in equity is not considered as pending until the

(Page 4)

summons had been issued and an effort made to have secured service. While the affidavit states that the defendants have been served with summons, it does not state when such summons was issued or the service had. If the judgment was entered before the summons was issued then

the suit in equity was not a pending action so as to abate the suit at law. **Fairbanks v. Farwell**, 141 Ill. 354; **Grant v. Bennett**, 96 Ill. 513; **Monroe v. Millizen**, 113 Ill. App. 156. The affidavit does not state facts sufficient to sustain a good plea in abatement.

Plaintiff in error made no effort to have defendant in error temporarily enjoined from entering judgment upon the note herein in controversy.

The judgment of the Circuit Court is affirmed.

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1707
201-135-
GENERAL No. 6428. OCTOBER TERM, A. D. 1915. AGENDA No. 7.

L. D. JACKSON, Appellant,

vs.

ARTHUR STEVENS, Appellee.

Appeal from

Circuit Court

Ford County.

ELDREDGE, P. J.

This is an appeal from the judgment of the Circuit Court of Ford County sustaining a demurrer to a declaration charging appellee with the publication of libelous matter. The declaration charges, in substance, that ^{plaintiff} ~~appellant~~, at the time of the publication of the article in question, was the County Clerk of Ford County and was a candidate for re-election to said office; that ^{defendant} ~~appellee~~ caused to be published in "The Paxton Record" and "The Paxton Daily Record", falsely and maliciously, of and concerning ^{plaintiff} ~~appellant~~ that he had squandered the money of the County; had flagrantly abused his trust as County Clerk and that by placing his O. K. on certain bills for printing primary ballots had made a gift of \$524 of the treasury of Ford County to the "Register". The demurrer admits

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the material allegations of the declaration, but it is contended by appellee that the publication of the article in question was privileged because every person has a right to comment on matters of public interest and criticise the public acts of an officer and especially when he is a candidate for re-election.

Anything bearing upon the acts of a public officer connected with his office is a legitimate subject of statement and comment, but the mere fact that a person may be a candidate for office does not create a license or justification for the publication of libelous matter to the injury of his character and reputation. In the case of **Rearick v. Wilcox**, 81 Ill. 77, it was held: "While the qualification and fitness of a candidate for office might properly be discussed with freedom by the press of the country, we are aware of no case that goes so far as to hold that the private character of a person who is a candidate for office can be destroyed by the publication of a libelous article in a newspaper, notwithstanding the election may be attended with that excitement and feeling that not unfrequently enters into our elections. * * * The law required appellee, as the publisher of a journal, to publish facts, and not libelous articles. The character and reputation of appellant was as sacred, and as much entitled to

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protection, when a candidate for office, as at any other time."

In **People v. Fuller**, 238 Ill. 116, it was held: "The claim is next made

that the publication of the article was privileged, as the criticism was directed against public officials. Public conduct of all public officers is a matter of public concern and may be made the subject of fair and reasonable criticism, but the privilege does not extend to false and defamatory statements imputing criminal offense or moral delinquency to the officer in the discharge of his official duties."

The declaration avers, and the demurrer admits, that the facts published in the article, that appellant had squandered money belonging to the County and had made a gift of such moneys to another newspaper called the "Register" were false and were maliciously made. The trial Court erred in sustaining the demurrer to the declaration and the judgment is therefore reversed and cause remanded with directions to overrule the demurrer.

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J. A. McQUAID,

Plaintiff in Error.

vs.

CITY OF WARSAW,

Defendant in Error,

Error to

Circuit Court of

Hancock County.

ELDREDGE, P. J.

by J. A. McQuaid Plaintiff
~~Plaintiff in error~~ brought an action on the case against the City of Warsaw to recover damages for injuries to his person and to his steam traction engine and separator alleged to have occurred through the negligence of the City in failing to keep a certain street in a reasonable safe condition for public travel. *For a motion to set aside the verdict and bring a new trial.*

After plaintiff had introduced his evidence, the defendant made a motion to exclude the same and direct a verdict of not guilty, which motion was overruled and the instruction offered in connection therewith was refused. At the conclusion of all the evidence a similar motion was made and instruction offered, which motion was sustained and the instruction given directing the jury to find the defendant not guilty. From the judgment rendered on the verdict so found this appeal is taken.

(Page 1)

The street in question on which accident occurred is in fact a very steep hill called College Hill and is located near the outskirts of the city. At the top of this hill were four or five small truck farms of about 25 acres each and the hill was used principally by the families living thereon. One of these truck farm was occupied by the witness, John Filtz. The plaintiff had for a number of years prior to the accident been in the business of threshing, using for that purpose a separator operated by a steam traction engine, and for some days before the accident had been using the same in performing such work for different people in the vicinity of Warsaw. Filtz had some clover which he desired to have hulled and had requested plaintiff to do the work for him, but told him about the hill, informing him that it was "awful" steep and rough and that he would rather the plaintiff would look at it first to see whether he could climb the hill with his engine; and that if he did not think he could climb up the hill Filtz would take his clover to some other place where the plaintiff could hull it. About two days before the accident plaintiff rode up the hill with Filtz in a buggy to examine it for the purpose of ascertaining whether he would be able to make the ascent with the traction engine. After they arrived at the top of the hill plaintiff got

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out of the
buggy and walked down the hill continuing his examination thereof on foot.

Some weeks prior to the accident the City had made some repairs on the hill by dumping gravel and macadam thereon and the evidence tends to show that there were a number of rocks scattered over the hill ranging in size from that of a man's fist to 6 inches in diameter. The evidence further tends to show that no traction engines had ever attempted to climb the hill, but when they had been used on the farms on the top of the hill they had been taken there by other routes, though this hill was the only public road leading thereto. Plaintiff concluded that he would try to take his engine and separator up the hill and on the day in question arrived in the City of Warsaw for that purpose. He first took the traction engine to the blacksmith shop where he had a collar and a band put on a cracked axle and a head placed on one of the spokes in the wheel. He then proceeded with the engine and separator to the foot of the hill. He guided the engine and his son acted as engineer thereof. To the engine was attached the separator, and Filtz rode on the engine with the plaintiff until they reached the foot of the hill, where the engine was stopped, Plaintiff at this point got off the engine, oiled and examined it, while his son built up the fire in order to have sufficient steam. Plaintiff

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then proceeded up the hill with the traction engine and separator. He ran the engine so that the wheels on the right hand side were in the dirt on the east side of the macadam and the left wheels of the engine ran in the macadam. Filtz walked up the hill ahead of the engine, throwing out such loose rocks as he found in the way of the wheels of the engine. After the engine had proceeded between 50 and 90 feet up the hill the cogs in the gearing broke, depriving the plaintiff and his son of any control of the engine, which immediately proceeded to start backward down the hill. Just about as it reached the bottom of the hill the wheels of the separator hit a stone on the side of the road, thus deflecting its course, causing the separator and engine to go over the side into a ditch or ravine.

The engine and separator were badly damaged and the plaintiff was injured.

The declaration avers, and the proof for plaintiff tends to show, that in the road bed where the macadam or gravel was, and over which the left wheels of the engine ran in going up the hill, a stone, about a foot square on its upper surface and from 4 to 6 inches thick, was imbedded in the road bed and that on top of the flat surface of this stone, gravel or macadam had been placed to a depth of 2 or 3 inches. The theory of the plaintiff is that the left hind wheel of the engine cut through

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the loose gravel and struck the smooth, hard surface of the stone, thereby causing the friction of this wheel to be lessened whereby it revolved more rapidly than the right hand wheel, by reason of which the cogs in the gearing were broken and a link was pulled apart, the result being that control of the engine was thereby lost.

The duty of a municipality in regard to its streets is to use reasonable care to keep them in a reasonably safe condition for the usual and ordinary methods of travel. If it be conceded that this rule applies to the running of traction engines weighing several tons on a very steep hill, the mere fact that a stone a foot square with a smooth upper surface was imbedded in the ground beneath the traveled way and over which had been placed 2 or 3 inches of gravel and macadam in such a way that a vehicle of sufficient weight might tear through the gravel and rest upon the hard, smooth surface of the stone, would not make the street unreasonably safe for public travel. This stone did not project up in such a way that the wheel of the traction engine hit it in collision therewith and thus cause the machinery to break, but the only claim is that because the top of this stone was smooth and hard there was less resistance to the left wheel than to the right. There is no expert

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testimony in the case that under the laws of mechanics such a condition or cause would or could produce the results claimed. In fact, it is doubtful whether any highway presents the same degree of friction to all the wheels of a vehicle moving thereover. The rock in question was not a loose rock, but was firmly imbedded in the bottom of the road with the flat surface thereof uppermost and could have presented no more dangerous condition to the road than if it had not been there at all.

The plaintiff was thoroughly familiar with the steepness of this hill and the condition of its surface. He had made a special trip up and down the hill for the sole purpose of examining its condition. Filtz had told him that he would take his clover to him at some other place if he did not think he could safely take his engine and separator up the hill. A party has no right to knowingly expose himself to danger, and then recover damages for an injury which he might have avoided by the use of reasonable precaution. **Lovenguth v. City of Bloomington**, 71 Ill. 238; **City of Centralia v. Krouse**, 64 Ill. 19; **North Chicago Street R. R. Co. v. Cossar**, 203 Ill. 608; **Beidler v. Branshaw**, 200 Ill. 425. While questions of negligence or of contributory negligence are ordinarily questions of fact, to be passed upon by a jury, yet when the undisputed evidence

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is so conclusive that it does not with all reasonable inferences tend to prove the cause of action and the Court would be compelled to set aside a verdict in opposition to it, the Court may withdraw the case from the consideration of the jury and direct a verdict. **Wells v. Illinois Steel Co.**, 154 Ill. 427; **North Chicago Street R. R. Co. v. Cossar**, *supra*; **Beidler v. Branshaw**, *supra*.

The declaration avers that the notice of the accident, which the statute provides shall be filed in the office of the City Attorney, if there

is any, and in the office of the City Clerk, was filed in the office of the City Clerk and further avers that at that time there was no City Attorney of the City of Warsaw. The record shows that proof was made by stipulation of the filing of the notice in the office of the City Clerk. No proof was offered or made as to whether there was at the time a City Attorney of the City of Warsaw. The statute is mandatory and the giving of the notice is a condition precedent to the right to bring the suit and it must be averred and proved by the plaintiff to avoid a dismissal of his suit. **Erford v. City of Peoria**, 229 Ill. 546; **Walters v. City of Ottawa**, 240 Ill. 259. The failure to make such averment or proof may be raised by a motion to direct a

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verdict. **Ouimette v. City of Chicago**, 242 Ill 501.

Such notice must be filed with the City Clerk and also with the City Attorney if there is a City Attorney, and in such case service of the notice on either one alone and not on the other is insufficient. The declaration avers that there was no City Attorney and proof of this averment should have been made.

There is no reversible error in the record and the judgment is affirmed.

JOHN M. WOLF,

Appellee.

Appeal from

Circuit Court

vs.

of Shelby

MORTON ELLISON,

Appellant.

County

ELDREDGE, P. J.

Appellee caused a judgment to be entered by confession against appellant on a promissory note dated November 11, 1907, for the principal sum of \$112.50 and purporting to have been executed by appellant. The amount of the judgment, which includes interest and attorney's fees, is \$177.37. The note purports to be payable January 11, 1908 after date, to the order of appellee with interest at 7 per cent per annum from date until paid. On appellant's motion the judgment was opened up and he was granted leave to plead. He filed two verified pleas, one that he did not make and deliver the writing in said declaration mentioned in manner and form as alleged, and the other that of non assumpsit.

-(Page 1)-

It appears from the evidence that appellee was in the note and mortgage business and that he at various times held a number of notes executed by appellant. Some of these were for moneys loaned to appellant by appellee, some were for moneys loaned to appellant by other parties and purchased by appellee, and some of the latter were so purchased by appellee at the request of appellant. On March 25, 1907, appellant's father, at appellant's request, paid a number of these notes to the amount, including interest thereon, of \$697.00. Appellee testified that appellant's father refused to pay more than \$700.00 on appellant's indebtedness and that he took up all the notes executed by appellant except the one sued on in this case which was executed by appellant as a renewal of the one remaining unpaid at the time appellant's father paid the other notes. Appellant contends that his father intended to and did take up and pay all his notes held by appellee at that time and that the note, for which this note in controversy was given as a renewal, was paid in that settlement. Appellant further claims that the note sued on has been materially altered and that he never executed it in its present form.

Appellant insists that a careful inspection of the note will disclose that the figure "8" in the due date January

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11, 1908, shows that it was originally a "7" and had been made an "8" by alteration. This is the material alteration complained of. The date of the note was November 11, 1907, and if the note had been made payable January 11, 1907, it

would have been made payable ten months before it was executed.

Appellant does not deny that he signed the note, but testified in a general way that he did not sign the note in its present form and does not attempt to point out how the note sued on is different from the one which he signed, except as above stated. The substance of his testimony as taken from the abstract is as follows: "That looks mighty like my signature to that note. I could not deny it and I won't own it. I never did make a paper like that. I won't say that I did not write it there." And again in his testimony he states: "I mean by saying that I never signed plaintiff's Exhibit A in the form it is now in, that I never signed a note like that one to John M. Wolf in my life. I never signed it on the date it bears or any other date. I don't mean to say that that is not my signature. It might be but if it is it was put up in some different form. I never saw the note in that shape."

Appellee testified that appellant signed the note in his presence and in the presence of a young lady in his office.

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who was working for him, but who is now dead. From these facts we think that the jury was justified in finding that the note was not materially altered after it was executed and that it was in fact executed by appellant, and also in finding from the evidence that neither it nor the original had been paid.

Complaint is made that the Court erred in sustaining an objection to a question propounded to appellant on direct examination asking if at any time from May, 1907, down to March, 1915, he was financially responsible for this note. The theory of appellant is that this evidence was admissible as tending to show that the note had been paid, for the reason that suit was not brought thereon for more than six years after it became due. It is further insisted that this evidence was also competent because appellee had testified that the reason why he had not sued on the note before was that it would have been unavailing to do so as only since the death of appellant's father has the note been collectable. When a stale claim is filed against the estate of a deceased person, evidence that the deceased was prompt in the payment of his debts and that he was at all times financially responsible for them is competent as a circumstance tending to show the unjustness of the claim or its payment. **Thorpe v. Goewey, Admr.**, 85 Ill. 611. But this rule

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cannot be invoked when the debtor is living. There is no presumption that a promissory note has been paid until the period of limitation of ten years has expired. In the case of **U. S. Wringer Co. v. Cooney**, 214 Ill. 520, it was said: "It is next urged that the Court erred in refusing appellant's instructions numbered 1, 2 and 3. Instruction No. 2 is to the effect that if plaintiff was in limited financial circumstances and the makers of the note were solvent, and

suit was not begun until seven years after the note became due, the law would presume that the note had been paid. This instruction is bad, for the reason the statute fixes the time as to when, as a matter of law, a promissory note is presumed to be paid, at ten years, and the evidence discloses it had only been a little over six years from the execution of the note until suit was brought." It was wholly immaterial whether appellant was financially responsible during the period of time mentioned in the question or not, or what reason appellee may have had for not attempting to collect the note at an earlier date.

Two other alleged errors in the rulings of the Court on the admission of evidence are mentioned in appellant's brief, but as no reference is made to the pages of the abstract where such rulings appear, we are unable to consider them.

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The Court refused one instruction offered by appellant. This informed the jury that in determining what facts are proven in the case they should carefully consider all the evidence before them together with all the circumstances of the transaction in question. The instruction is open to the criticism that it does not limit the circumstances which the jury were to consider to those shown by the evidence. We do not think the instructions given on behalf of appellee are subject to the objections made to them.

One of the points made by appellant in his motion for a new trial is that he was taken by surprise by the testimony of appellee because it is claimed it differed in several respects from the testimony he gave on a former trial of this case, and that appellant did not have time to have the testimony of appellee on the former trial written up by the reporter to be used for impeachment purposes on this trial. If this testimony had been written up by the reporter, his transcript thereof could in no way have been competent evidence for any purpose. Appellant knew what appellee had testified to on the former trial and it was a matter wholly within the option of appellant whether in his judgment as a proper preparation for this trial he should

(Page 6)

have had the evidence of the former trial transcribed by the reporter for his convenience as a memorandum in propounding impeaching questions in case any of the witnesses should change their testimony, and we know of no rule of law requiring the granting of a new trial for this purpose.

There being no reversible error in the record, the judgment is affirmed.

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1700

GENERAL No. 6438. OCTOBER TERM, A. D. 1915. AGENDA No. 69.

J. C. GRAFF and JOHN SCHULTZ,
under the firm name of
J. C. GRAFF & COMPANY,
Defendants in Error,
vs.
GEORGE MOENCH,
Plaintiff in Error.

Writ of Error
to Circuit Court
of
Schuyler County.

ELDREDGE, P. J.

Plaintiff in error appeals from a judgement for \$3726.09 rendered against him in an action of assumpsit brought by defendants in error to recover a balance alleged to be due on account of some deals transacted by the former on the Board of Trade in Chicago and also a few items of merchandise actually sold and delivered to the former by the latter in the usual course of business amounting to \$25.95.

The case is before us for the second time, the opinion on the former appeal being reported in 181 Ill. App. 127. While several additional witnesses were heard on the last trial, the facts, in so far as they pertain to the real issue as to whether the deals in question were gambling contracts are substantially

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the same as they appeared in the record on the first appeal, and after a further careful consideration thereof we adhere to our former opinion that the deals in question were gambling transactions for which no recovery can be had under the laws of this state, and that the verdict of the jury is clearly and manifestly contrary to the weight of the evidence.

There is no dispute, however, that plaintiff in error purchased from defendants in error in the usual course of trade for his own small quantities of bran, corn and other articles to the amount of \$25. 95 for which he has not paid. At the close of the evidence on the trial, plaintiff in error offered an instruction directing the jury to return a verdict against him for said amount, which the Court refused. This instruction should have been given.

The judgement is reversed and cause remanded.

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1161
201-2-11
GENERAL No. 6439. OCTOBER TERM, A. D. 1915. AGENDA No. 16.

D. M. TUCKER,

vs.

CHARLES WARNER and ELIZABETH
WARNER,

Appellee,

Appellants.

Appeal from
County Court
Champaign
County.

ELDREDGE, P. J.

This is an action of assumpsit brought by appellee against appellants to recover wages for several months labor on appellants' farm in Mississippi. Appellee is a cousin of appellant Elizabeth Warner, and the evidence on his behalf tends to show that he agreed to work on the farm owned by appellants in Mississippi for \$25.00 per month, together with his board and lodging and that he was also to receive one-half of all that was raised on the plantation after deducting his wages and other expenses. The evidence for appellants tends to show that appellee agreed to work for the entire year of 1913; that he was to be furnished his board, to receive \$300 for the year's wages and in the event that the net proceeds of the crop exceeded

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\$600.00 he was to receive one half of the same. Appellee worked for appellants about five and a half months, when he quit, and this suit is to recover the balance of his wages due up to that time.

A jury was waived and the case was tried before the Court, who found the issues joined in favor of appellee and assessed his damages at \$117.50, on which finding judgement was rendered. The issue before the trial Court was wholly one of fact as to what were the terms of the contract. The evidence on this question was conflicting and we can find no reason from the record for disturbing the finding of the trial Court.

The judgement is therefore affirmed.

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C. W. JONES, for the use of
REBECCA STEVENS,

Appellees.

vs.

AETNA INSURANCE COMPANY,
Appellant.

Appeal from
Circuit Court
Moultrie County.

ELDREDGE, P. J.

Rebecca Stevens recovered a judgment in the Circuit Court of Moultrie County against C. W. Jones, on April 1st 1914, for the sum of \$275 and subsequently instituted this suit, which is a garnishment proceeding in the name of C. W. Jones for her use against the appellant, Aetna Insurance Company. Eight interrogatories were filed which were answered by appellant. The answer to the second interrogatory stated that appellant did not at or after the time of the service of process upon it have, and has not now in its possession, custody or charge any goods, chattels, moneys, choses in action, credits or effects of the said C. W. Jones. The answer to the third interrogatory stated that appellant was not at the time of such service and is not now in any manner indebted to

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the said C.

W. Jones. The sixth interrogatory was as follows:

"Sixth: Have you ever adjusted or paid said loss?"

To this appellant made the following answer:

"For answer to the sixth of said interrogatories the defendant says that it has never adjusted or paid said loss and states that it has at all times denied liability under the said policy because the said policy on or about the 17th day of March, A. D. 1914, became and has ever since remained and continued to be void and of no effect whatever."

In answer to the seventh interrogatory appellant stated that it did not carry any insurance on said property at the time of the fire as stated in its answer to said sixth interrogatory.

In answer to the eighth interrogatory appellant stated that said loss had not been adjusted and that it denies any liability whatever to any person whomsoever under the said policy of insurance.

On June 26, 1913, Claude S. Wheeler, who conducted a general store in Kirksville, Moultrie County, took out a policy of insurance for \$1800 with appellant company for the term of one year on the stock and fixtures of a general store. On December 27, 1913, Wheeler sold the stock and fixtures covered by the policy to said Jones by a bill of sale and assigned the

(Page 2)

policy to the latter January 5, 1914, by a written assignment which was approved by the agent of appellant, R. C. Parks. On the 30th day of March, 1914, the store building and the stock and fixtures

were destroyed by fire. At the time of the sale of the stock and fixtures to Jones on December 27, 1913, he executed a chattel mortgage on the same to Wheeler to secure the payment of a note for \$600 as part of the purchase price thereof. On March 17, 1914, Jones executed a second chattel mortgage for \$500 to Wheeler, which the evidence tends to show was a renewal of the first mortgage, the difference in the amount being explained by an agreement that Jones would give Wheeler a credit for \$100 worth of groceries. The first mortgage was not released at the time, but remained on the property for some time thereafter. On a trial before a jury in the court below, appellee recovered a judgment for the sum of \$287.94.

The policy contains a provision that as part of the consideration for which it was issued and the basis upon which the rate of premium was fixed, the assured covenants and agrees to keep a set of books showing a complete record of business transacted, including the purchases and sales both for cash, credit and exchange, together with a last detailed inventory of stock shall have been taken within twelve months prior

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to the date of the happening of any loss; and further to keep such books and inventory securely locked in a fire proof safe at night and at all times when the store is not actually open for business and incases of loss to produce said books and inventory, and in the event of a failure to produce the same the policy to become null and void. The policy also contains a provision that it shall become void if the assured has concealed or misrepresented any material fact concerning the subject thereof; or if the interest of the insured be not truly stated therein; or in case of any fraud or false swearing by the insured touching any matter relating to the insurance whether before or after a loss; or if the subject of insurance be or become encumbered by a chattel mortgage.

Two defenses were relied upon by appellant, first, that the policy became void by reason of the placing of the chattel mortgages on the property insured; second, because Jones did not keep such a set of books as is provided for in the policy and that a part of such as he did keep were not placed in the safe, and also that no inventory had been made and kept in the safe.

To meet these contentions appellee claims that by the answer to the sixth interrogatory appellant has waived all defenses

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to the policy except that it became void by reason of the execution of the second chattel mortgage on March 17, 1914, and is estopped from now assigning any other reason to avoid the same; that the proof shows that the agent knew what books appellee kept and that he did not keep them in the safe; also that he knew of both the chattel mortgages; that his knowledge of these facts was the knowledge of the company and as he made



no objection thereto and did not cause the policy to be cancelled, appellant by reason thereof must be deemed to have waived the violations of the iron safe and chattel mortgage clauses.

The position of appellee that the answer to the sixth interrogatory precludes the consideration of any defense to the policy except as to that pertaining to the execution of the second chattel mortgage cannot be sustained. This interrogatory could and should have been answered by either yes or no, and we do not think that because the second chattel mortgage was made on the 17th day of March, 1914, that it must necessarily be presumed that appellant intended to refer to it as the only reason why the policy became void. The mortgage itself is not mentioned in the answer, and the date mentioned is described as "on or about" the 17th day of March, 1914. The statute provides that there shall be no formal pleadings in garnishment cases and it has been

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repeatedly held that the question at issue in such cases is whether the garnishee is indebted to or has any property of the debtor in his possession at the time the answer is filed. **Wheeler v. Chicago Title & Trust Co.**, 217 Ill. 135; **Schwab v. Gingerick**, 13 Ill. 698; **I. C. R. R. Co. v. Coff**, 48 Ill. 402; **McCoy v. Williams**, 6 Ill. 589; **Boeie v. Tudor Boiler Mfg. Co.**, 51 Ill. App. 304. We think the answers to the interrogatories and appellee's traverse thereto fairly present this issue.

The iron safe clause, as it is commonly called, in insurance policies has been held to be reasonable and valid provision in a policy against fire, (**Niagara Fire Insurance Co. v. Forehand**, 169 Ill. 626,) as has also a condition against encumbrances, such as chattel mortgages, (**Crikelair v. Citizens Ins. Co.**, 168 Ill. 309.) It has also been repeatedly held that conditions of insurance policies made for the benefit of the insurer may be waived expressly or impliedly by the insurer or its duly authorized agent. **Phoenix Ins. Co. v. Grove**, 215 Ill. 299; **Niagara Insurance Co. v. Brown**, 123 Ill. 356; **Retail Merchants Fire Ins. Co. v. Cox**, 138 Ill. App. 14; **Hollstram v. Forest City Insurance Co.**, 168 Ill. App. 214.

The rule is also well established that notice to an

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agent while acting within the scope of his authority and in reference to a matter over which his authority extends, is notice to the principal. This rule is based upon a presumption that the agent will transmit his knowledge to the principal for the reason that the law will presume that he will perform his duty to disclose to his principal all knowledge which he may possess and which may be necessary for his principal's guidance and protection. There is, however, an exception to this rule which is as well established as the rule itself, and that is that where the facts show collision between the agent and the one with whom he is dealing, to defraud

the principal, or where the facts and circumstances are such as to raise a clear presumption that the agent will not perform this duty. The rule charging the principal with his agent's knowledge is established for the protection of those who deal with the agent in good faith. The rule will not prevail where it is certainly or reasonably to be expected that the agent will not perform this duty, and in such case the principle will not be affected by the agent's knowledge though it was received by the agent in the course of the agency. **Cowan v. Curran**, 216 Ill. 598; **Merchants National Bank v. Nichols & Co.**, 223 Ill. 41; **Rockford Insurance Co. v. Nelson**, 65 Ill. 415; **Booker v. Booker**, 208 Ill. 529; **Seaverns v. Presbyterian Hospital**, 173 Ill. 414;

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31 Cyc 1573, 1595, 1596.

The contention of appellee that appellant has waived the condition in the policy in regard to the chattel mortgage on the ground of the agent's knowledge thereof, is largely based upon the testimony of Wheeler. He testified that after Jones had executed the chattel mortgage to him, but before the policy had been assigned to Jones, he had a conversation with the agent Parks in which he informed Parks that Jones had executed the chattel mortgage. His testimony on direct examination as to what was said at that time is substantially as follows: "He (Parks) told me it was best not to have mentioned the mortgage at all, to let the policy go straight and not say anything about the mortgage. There was a \$600 mortgage on it, he said the best thing to do was not to say anything about it, that the policy forbid it. He told me not to say anything about the \$600 mortgage, but to let it go. He told me I would get my money all right if they had a fire that way. eH said he had had experience and knew. He said this with the mortgage on there. He said it would remain in force. I told him the mortgage was there. He said the policy would be good if I left it off." On cross examination the substance of his testimony in this regard is: "After this first chattel mortgage was executed I had a talk with Mr. Parks. He told me that

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if I executed the chattel mortgage and showed it on the policy, that the policy would be void. He told me not to show it on the policy. I had assigned the policy to Mr. Jones at that time. I told Mr. Jones that the chattel mortgage would make this policy void." In regard to the second chattel mortgage Wheeler testified in substance: "I told Mr. Parks the day I got the second mortgage, the chattel mortgage fixed up, what I was going to town for. About all I know he said that was the thing to do. I told him I was going to get a new mortgage, I didn't know what the amount was going to be, but I was going to get a new mortgage. After I got this second mortgage of \$500 fixed up and recorded, I had a talk with Mr. Parks. I told him I got the mortgage of \$500 and \$100 worth of groceries. I told him the mort-

gage was on the stock of goods. He said it was all right, only I ought to have got \$200. I had no further conversation after that time and before the fire with reference to the policy with Mr. Parks. I never told Jones nothing about the second conversation about the second chattel mortgage."

Jones testified in regard to the chattel mortgage as follows: "I think I had a talk with Parks about this chattel mortgage right after I went down there. I never knew the policy was void if there was a chattel mortgage on it until Mr. Wheeler

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said that here. I don't know whether Parks told Wheeler that or not. I was at Parks office one day and he was giving me some advice. I think we had a talk about the chattel mortgage. I don't remember what he said about the mortgage. I know it was mentioned."

The agent Parks was called as a witness by both parties. He does not deny the conversation with Wheeler in regard to the first mortgage, but does deny any knowledge of the execution of the second mortgage and that he ever talked with Jones about it. Reasonable minds cannot differ as to the only conclusion that can be drawn from this evidence, and that is that the agent collusively and fraudulently agreed with Wheeler and Jones to suppress all notice of these chattel mortgages from coming to the knowledge of appellant. This is further borne out by the fact that Parks never even notified appellant that the policy had been assigned to Jones. Under the facts and circumstances it was reasonably certain that Parks would not disclose the facts in regard to the chattel mortgages and his knowledge thereof cannot be imputed to appellant.

The only books of account that were kept by Jones appears to be what is called the "McCaskey system". Just what

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this system is does not appear in the evidence with any degree of certainty, but whatever it was, it sufficiently appears that it was in no sense "a set of books showing a complete record of business transacted, including all purchases and sales, both for credit and exchange, together with the last detailed inventory of stock." The evidence shows that generally the McCaskey system was placed in the safe at night, but on the night of the fire it had not been put in the safe and was destroyed, and the proof is also that if there ever had been an inventory it was not in the safe at the time of the fire. The evidence further shows that the invoices for goods purchased were never kept in the safe, but were hung on a hook on the wall of the store.

The post office was located in this store building and Wheeler was the post master, which position he continued to hold after he sold the stock of goods to Jones. The position of appellee that appellant waived the condition imposed by the iron safe clause is founded upon the facts that



Parks went into the store several times a day to get his mail, occasionally eat down and loafed there and on one occasion at night held a lamp while appellee placed the McCaskey system in the safe. On this question most of the proof seems also to come from the witness Wheeler who

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testified that as post master he was in the store and knew the value of the goods owned by Jones when they were destroyed by the fire; that his duties as post master did not keep him very busy and that he frequently waited on customers for Jones. He testified that he was present when Parks held the lamp so Jones could see to put the McCaskey system in the safe; that the invoices were hanging on a hook on the wall at times when Parks was in the store. He was asked by counsel for appellee if he knew how Jones kept his accounts. In answer to that question he said, "I don't know how Mr. Jones kept his accounts. I know how I kept them." After he made this statement he was asked the following question: "What do you know about whether the agent was familiar—Mr. Parks was familiar with the way accounts were kept in the store?" He answered "I am positive he knew." An objection was made to the question and overruled. Thus this witness, who had much greater facilities for knowing how Jones kept his books than Parks had, was apparently willing to testify that while he himself did not know in what manner Jones kept his books, yet he was positive that Parks knew. The latter question was incompetent and the objection thereto should have been sustained and the answer excluded. Later in his testimony Wheeler volunteered the information "He (Parks) came over to get

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his mail three or four times a day and he has been loafing at the store long enough, he ought to know how it was kept." While this voluntary statement on motion of appellant was excluded, it tends to show the bias of the witness.

Jones procured Wheeler to help him make out his proofs of loss. In these proofs of loss, which were sworn to by Jones, is this statement, "That the property insured and lost was owned by me absolutely and that there were at time of loss no liens or mortgages upon the same except as follows: One chattel note in sum of \$600 in favor of Claude S. Wheeler, given as a part of the said purchase price of said stock and fixtures, that the same was due one year from date thereof and that the said chattel note has since been paid in full." All the above statements except the one alleging that Jones was the owner of the goods, are admittedly false.

The witness Jones was asked to state whether or not Parks knew where the invoices of bills payable were kept in the store. An objection to the question was overruled and he answered, "Yes, he could not help but know it, he was right there." On motion this answer was stricken out and the following question was asked him, "You may state if he did

know." To which he answered "He did". The answer was but the conclusion of

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the witness and was an answer to a question which called for nothing but a conclusion. Appellee had a right to ask the witness concerning any facts which might tend to show knowledge on the part of the agent as to the manner in which the accounts and invoices were kept, but whether the agent did have such knowledge so as to charge his principal with the same was one of the points in issue and was an ultimate question of fact to be determined by the jury. What has been stated in this opinion disposes of the questions raised in regard to the giving and refusing of instructions.

The judgment is reversed with the following findings of facts to be embraced by the Clerk in the record of the judgment of this court. The Court finds the following facts: (1) that appellee Jones violated a provision of the policy of insurance by executing two chattel mortgages on the property insured; (2) that the knowledge of the execution of said chattel mortgages was kept from the knowledge of the appellant by the collusion and fraud of appellee and the agent of appellant; (3) that the agent of appellant did not communicate his knowledge of the said violations of the policy to appellant and the facts and circumstances show with reasonable certainty that he never intended to do so; (4) that the knowledge of the agent of said

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violations of the said policy of insurance by the execution of said chattel mortgages by appellee Jones, was not the knowledge of appellant.

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NELLIE CASH,

vs.

ARTHUR W. CASH,

Appellee,

Appellants.

Appeal from
Circuit Court
of Macon
County.

ELDREDGE, P. J.

Appellee filed a bill for separate maintenance against her husband, Arthur W. Cash. There was a decree for complainant whereby she was awarded an allowance of \$75 per month and a solicitors' fee of \$100.

Without detailing the facts shown by the record, the competent evidence admitted fully sustains the finding of the Chancellor on the merits. The amount allowed for alimony under the facts is not excessive, nor was there any reversible error in the rulings of the Court in the admission and exclusion of evidence. One point is made that as appellant offered to permit his wife to return and live with him, which she refused to do, the bill should have been dismissed for want of equity.

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The offer to receive appellee back as his wife was coupled with so many conditions, restrictions and limitations that no self respecting woman could comply therewith, and appellee was not compelled to accept it.

The Court allowed \$100 as solicitors' fees to the solicitors for appellee and it is contended that as the record shows that the Chancellor heard no evidence in support of the allowance of solicitors' fees the decree is erroneous in this respect. This would be true if it was a fact. **Metheny v. Bohn**, 164 Ill. 495. **Hosto v. Hosto**, 183, Ill. App, 463. **Cash v. Cash**, 180 Ill. App. 31. But appellee has filed in this court an amended transcript of the certificate of evidence which shows that the Chancellor heard the evidence of several witnesses in regard to the question of the amount of reasonable solicitors' fees for the solicitors of complainant, and the amount found by the Chancellor is not excessive. The decree orders that the allowance of the alimony and solicitors fees be declared a lien on certain real estate of defendant. This was proper. **Leafgreen v. Leafgreen**, 127 Ill. App. 184.

The decree, however, is erroneous in two minor respects. It makes the allowance for alimony and solicitors' fees also a lien upon the household furniture. A court of chancery has no power

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to make a decree for alimony and solicitors' fees a lien on personal property. **Hunter v. Hunter**, 121 Ill. App. 380. **Harris v. Harris**, 109. App. 148. **Yelton v. Hand-**

ley, 28 Ill. App. 640. The decree also finds that \$100 is a reasonable fee for the solicitors of complainant for their services in this proceeding and orders that appellant pay to the Clerk of the court for the use of appellee's solicitors, the sum of \$100. The allowance of this fee should have been made to appellee, the complainant, and not to the solicitors themselves. The decree should have required the money to be paid to her or to the Clerk for her use. **Anderson v. Steger**, 173 Ill. 112.

The decree is affirmed in all respects except as to the errors mentioned, in which regard it is reversed at appellant's costs with directions to enter a decree in conformity with the views herein expressed.

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THE CITY OF LINCOLN,

Appellee,

vs.

THE St. LOUIS, SPRINGFIELD & PEORIA
RAILWAY COMPANY,

Appellant.

Appeal from
Circuit Court
of Logan
County.

ELDREDGE, P. J.

The City of Lincoln instituted this suit against appellant before a Justice of the Peace to recover a penalty for obstructing a public street in said city by constructing and maintaining a fence therein. On appeal to the Circuit Court, a jury was waived, the Court found the issues in favor of the City, fixed the fine at \$10 and entered judgement accordingly.

Paris street was embraced in the original town as originally laid out and dedicated in 1853, was 30 feet wide and extended along the south and southwest sides of Blocks 26 and 27 of the original town, now City of Lincoln. The evidence shows that for a number of years prior to 1876 a fence had been built and maintained on the south side of the street 30 feet south of the south line of Block 26. This fence marked the south

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boundary line of Paris Street. Paris Street was a bordering street and the land south thereof has never been platted or subdivided. In 1863 F. D. Elliott became the owner of the land adjoining Paris Street on the south, and in 1873 Henry F. Elliott acquired an undivided one-half interest therein. The Elliotts owned and operated a flour mill on Block 27, which lies between Decatur and Paris Streets along the right of way of the Chicago & Alton Railroad, and north of Paris Street. About the year 1876 the Elliotts moved the fence then located along the south side of Paris Street, south 20 feet, thus making Paris Street 50 feet wide instead of 30. The latter fence existed in that location for many years until it rotted down. The evidence for appellee tends to show that the public used this 20 foot strip as a part of Paris Street, that the city treated Paris Street from that time on as being 50 feet wide and kept it in repair for public travel the same as the other streets in the City. After the fence rotted down the evidence does not show that any other fence was ever erected in place thereof, but that the land south of the line of the fence was open and unimproved. In 1906 George M. Mattis acquired title to the land south of Paris Street, which was subsequently conveyed to appellant. After appellant acquired title thereto, it requested

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the City of
Lincoln to build a cross walk over the west end of Paris Street for the use of the public in going to appellant's station. This was done and a walk

✓ constructed across Paris Street for the length of 50 feet. In August, 1914, appellants erected a fence along the original 30 foot line and this is the obstruction which is the basis of this suit. The evidence for appellee tends to show that for thirty-eight years the 20 foot strip set out by the Elliotts had been used by the public and controlled by the city as a part of Paris Street, but appellant introduced evidence which it claims shows that the original intention of the Elliotts was simply to widen Paris Street for their own convenience and that of their customers in going to and from their mill and that there never was any intention of dedicating this 20 foot strip as a part of the street. The fact that the Elliotts might have thought it would be more convenient and profitable to them to have this street 50 feet wide would not necessarily imply that they did not intend to dedicate the 20 foot strip as a part of the street. The facts strongly support the theory that they did so intend to dedicate this strip. They removed the fence from the boundary of the street and erected it 20 feet south thereof and this fence was so main-

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tained for many years until it rotted away. The City took control over this strip as part of the street with their acquiescence and consent so far as the records shows, and the public have used it ever since as a part of the street. The evidence is sufficient to sustain the finding of the Court, that the City has acquired a right to use this strip for street purposes by the use thereof for more than fifteen years under Sec. 1, Chap. 121 R. S., Village of Peotone v. I. C. R. R. Co., 244 Ill. 101, and cases cited.

The judgement of the Circuit Court is affirmed.

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GENERAL No. 6459. OCTOBER TERM, A. D. 1915. AGENDA No. 34.

ELIZABETH KACKLEY,

Appellee.

vs.

CENTRAL ILLINOIS TRACTION CO.

Appellant.

Appeal from
Circuit Court
of Edgar
County

ELDREDGE, P. J.

Appellee recovered a judgment against appellant for \$1,000 in an action on the case for personal injuries received as a result of a collision between a street car operated by appellant and a public taxi cab in which she was riding.

The original declaration consisted of three counts, the first of which charges appellant through its servants, with general negligence in the operation and management of said car while she was riding in a taxi cab and in the exercise of due care for her own safety and while the chauffeur of the taxi cab was operating the same with due care and diligence; the second charges appellant with negligence in failing to give warning

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of the approach of its car and with failing to have the car under its control so as to prevent collisions with travellers upon the street; and the third, in failing to give warning of the approach of its car by ringing the bell; in failing to have said car in such repair and condition that it could be controlled so as to avoid collisions; by carelessly managing said car; and by driving it at a high rate of speed.

A demurrer was sustained to the second and third counts on the ground that they did not allege that the driver of the taxi cab was in the exercise of due care and diligence. Thereupon the plaintiff amended the second and third counts by inserting therein the allegation, as averred in the first count, that the driver of the taxi cab was at the time operating the same with due care and diligence.

~~The facts show that~~ On the 22d day of February, 1914, ^{plaintiff} appellee, together with Anna Trine, with whom she was visiting in the City of Paris, and Mrs. Hiatt, went from the Trine residence to the residence of one Mrs. Sally Wetzell, in a public taxi cab. Paul Hicks was the chauffeur of the taxi cab, but had no chauffeur's license as required by Section 269-M, Chapter 121, Hurd's R. S., 1911. The taxi cab used was a Ford with an enclosed body;

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the rear seat and two small seats facing the rear were enclosed in one compartment and were shut off from the front seat occupied by the chauffeur. The front seat was not enclosed either on the sides or on the front. The cab approached the Wetzell residence from



the south and stopped in front thereof, headed south, on the left hand side of the street at the west curb line, in violation of Section 5 of a certain ordinance of the City of Paris which provides as follows: "No vehicle shall stop with the left side to the curb on any street." Appellee left the taxi cab, went into the Wetzell residence, and got a little girl, Dorothy Smock, whom she was to take back with her to Bloomington, Indiana. The other ladies remained in the taxi cab while appellee went into the Wetzell residence for the little girl. She brought out with her also some baggage which the chauffeur Hicks put on the front seat of the taxi; she and the little girl then got into the cab with the other ladies. The tracks of ^{defendants} ~~appellee's~~ street car line run along the center of the street, which is 30 feet wide between the curbing, and the space between either rail and the curbing is about 12 1-2 feet. After Hicks placed the baggage on the front seat he started the motor, got in the cab and backed south-east on to the tracks of ^{defendant} ~~appellee~~. He was backing

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the car so that he could turn it south and go back in the direction from which he came. As the rear wheels of the car reached the track it was struck by the street car which was going north. The cab was demolished and appellee was thrown some distance and injured. When the cab first commenced to back towards the tracks the street car was between 30 and 40 feet distance, though both appellee and Hicks testify that they did not see any street car approaching. After the accident Hicks told several witnesses that the reason he backed clear over on to the tracks was "that his reverse stuck." There was snow on the ground and the rails of the track were wet and slippery. Appellee testified that she knew the cab had stopped on the wrong side of the street, but gave it no thought and paid no attention to it; also that when she returned to the cab with the little girl she and her companions all became engaged in conversation and paid no attention to and did not attempt to ascertain whether a street car was coming or whether the cab was backing or going forward.

There was no evidence tending to show that the street car was out of repair or that it was out of control of the motorman. The evidence shows that a car could be seen from the point where the taxi cab stood before the accident for a

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distance south of between five and seven blocks. No ordinance was introduced showing that the speed of street cars was limited within the city. The evidence in regard to the speed of the car is conflicting. The witness Boatmen testified that he was standing inside the front door of his father's residence, which was the second house north of the Wetzell residence, and that he first saw the street car when it was about 40 feet from the point of collision and at that time

he judged it was going between 18 and 20 miles an hour. The witness Brown testified on behalf of the plaintiff that he was walking along the middle of the street car tracks between 150 and 200 feet south of Edgar Street, which street the evidence shows was 312 feet south of the point of collision; that he observed the car as it passed him and he judged at that time it was running between 23 and 25 miles an hour. The great weight of the evidence shows that the car stopped at Edgar Street and discharged two passengers before it proceeded north and came into collision with the cab. The evidence introduced by appellant tended to show that the speed of the car was about 10 miles per hour.

It is first insisted that as the first count of the declaration and the second and third amended counts each aver that the chauffeur of the taxi cab was in the exercise of due

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care, the plaintiff was bound to prove that fact before she could recover. This position cannot be sustained as it was unnecessary to aver due care on the part of the chauffeur. His negligence cannot be imputed to appellee. **Flynn v. Chicago City Ry. Co.**, 250 Ill. 460, and cases cited. The allegation of due care on the part of the chauffeur is mere surplusage. **Dunham v. Black Diamond Coal Co.**, 239 Ill. 457; **Illinois Steel Co. v. Schymanowski**, 162 Ill. 447. It was held in **Barnes v. Northern Trust Co.**, 169 Ill. 112: "Surplusage comprehends whatever may be stricken from the record without destroying the right of action, or the charge, on the one hand, or the defense on the other. * * * * * Where unnecessary allegations are made in the declamation, which are foreign and irrelevant to the cause, they will be rejected as surplusage, and need not be proved." So far as the plaintiff's right of action was concerned this allegation was immaterial and therefore need not have been proven. **Postal Telegraph Cable Co. v. Likes**, 225 Ill. 249; **E. St. Louis C. Ry. Co. v. Altgen**, 210 Ill. 213; **L. S. & M. S. Ry. Co. v. Hundt**, 140 Ill. 525. Counsel for appellant have cited the case of **Wabash Western Ry. Co. v. Friedman**, 146 Ill. 583, as holding a contrary view. On an examination of this case it will be found that there is no conflict between the rule announced therein and

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the cases above mentioned. In the Friedman case the action was based upon the violation of a duty imposed by a contract of carriage between plaintiff and the defendant railroad company, and the principle of law announced was that when one sues in an action *ex delicto* to recover damages for the violation of a duty imposed by a contract between the parties and the terms of the contract from which the duty arises are alleged specifically and in detail the proof must correspond with the terms so alleged or there will be a variance between the allegations and the proofs. The liability in the case at bar



does not arise from the violation of a duty imposed by any contract between the parties.

It is next urged that appellee was guilty of contributory negligence in riding in a taxi cab driven by a chauffeur who had not procured a license in accordance with the laws of the State and in knowingly permitting him to drive and stop said car on the wrong side of the street contrary to the ordinances of the City. It has been definitely settled in this State by the decision of **Flynn v. Chicago City Railway Co.**, 250 Ill. 460, that negligence of the driver of a vehicle with whom the injured person is riding and who is not the agent or servant of such person will not be imputed to such injured person, but such injured

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person is always responsible for his own negligence and if his negligence contributed to the injury he cannot recover. And it is undoubtedly no less the duty of the passenger where he has an opportunity to do so, than of the driver, to learn of the danger and avoid it if possible, but this rule cannot apply to cases where the passenger is seated away from the driver or is separated from him by an enclosure and is without opportunity to discover danger and inform him of it. **Flynn v. Chicago City Ry. Co.**, *supra*; **Brickell v. N. Y. C. & H. R. R. Co.**, 120 N. Y. 290; **L. S. & M. S. Ry. Co. vs. Boyts**, 16 Ind. App. 640. In the latter case which is cited in the Flynn case, *supra*, it was held: "And the same rule would not apply where the guest was riding inside a closed carriage, without opportunity to discover danger and inform the driver of it, that would apply where the guest was seated at the driver's side and had the same opportunity with the driver to discover and avoid danger." Appellee was in the enclosed taxi cab, had no means of communication with the chauffeur, and did not know of his intention to back upon the tracks and thereby place her in danger of collision with the approaching car.

The fact that the chauffeur did not have a license could have no bearing upon nor affect the acts of negligence, if

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any, of appellant in the operation of its car. **Grossen v. C. & J. El. Ry. Co.**, 158 Ill. App. 42; **Latham v. C. C. C. & St. L. Ry. Co.**, 164 Ill. 559.

[The chauffeur Hicks testified on direct examination that he went to his home at one o'clock on the day of the accident, and on returning at two o'clock to his place of work he rode on this street car on which were the same motorman and conductor who were in charge of the car at the time of the accident; that in his opinion, the conductor on this occasion was under the influence of liquor and was talking and joking with a colored girl on the car. On cross examination he testified that the conductor was not drunk, but was slightly intoxicated, that he just had enough to

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Defendant
have a good time. Appellant made a motion to exclude this testimony, which was overruled. There was no testimony tending to show that the conductor was intoxicated or drunk at the time of the accident, which occurred between half past three and four o'clock, an hour and a half or two hours later. The evidence in this case, in regard to the question as to whether appellant was guilty of any negligence in the operation of the car is exceedingly meagre and this testimony without some proof that the conductor was in a like condition at the time of the accident was incompetent as being too remote and

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was liable to have a very prejudicial effect upon the jury.

For the error indicated the judgement is reversed and cause remanded.

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A. C. RICE, Administrator of the Estate of
LLEWELLYN DAVIES, Deceased, Ap-

vs.

RICHARD DAVIES, Et Al, Appellants.
pellee,

Appeal from

County Court of

Morgan County.

ELDREDGE, P. J.

Appellee was appointed administrator of the estate of Llewellyn Davies, December 6, 1912. On January 26, 1915, he filed a petition for leave to sell real estate to pay debts. At the March Term, 1915, of said court, a decree was entered directing him to sell certain real estate for the payment of debts. At the April Term, 1915, appellants filed a petition in the nature of a bill of review praying that said decree be set aside for the following reasons: (1) the petition does not give an estimate of the amount of just claims to be presented as required by law; (2) it fails to state the nature and extent of all liens upon said real estate and fails to make certain claimants parties defendant; (3) that the decree fails to find as a necessary jurisdictional fact what amount of just claims are yet to be presented; (4) that

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the petition is not properly verified; (5) that said petition and decree are based upon letters of administration issued without authority of law; (6) that there was a constructive fraud in the appointment of the administrator. The court refused to set aside the decree and dismissed appellants' petition.

Section 100, Chapter 3, R. S. (Administration Act) provides that the petition shall set forth, among other things, the amount of claims allowed and an estimate of the amount of just claims to be presented, and it is urged that as this petition of the administrator did not set out an estimate of the amount of just claims to be presented, it is totally defective. Letters of administration were granted December 6, 1912. The petition for the sale of real estate was not filed until January 26, 1915. More than one year having elapsed after the letters of administration had been issued all claims not filed at the date of the filing of the petition were barred. *Therens v. Therens*, 267 Ill. 592. No other claims could have been presented thereafter and under these circumstances it was unnecessary to make such an averment in the petition, as the law does not require a useless act.

The next objection is that the petition fails to make certain persons, who were joint claimants in a claim which had not been allowed, parties defendant. The statute does not require

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that persons who have filed claims against an estate shall be made parties to a petition of this character.

What we have already said disposes of the third contention that the decree fails to find as a jurisdictional fact the amount of just claims to be presented.

A general statement is made that the petition is not properly verified. In what manner it is defective is not stated in appellants' brief and as the verification nowhere appears in the abstract, this question cannot be here considered.

Appellee Rice was appointed administrator of the estate upon the application of the children of the deceased J. W. Davies and E. M. Davies. He had no interest in the estate except as administrator thereof. Appellants claim to be children of a former wife of the deceased, and reside in the County of Montgomery, Wales, Great Britain. They allege in their petition to set aside the decree that their mother was living at the time of his subsequent marriage with the mother of J. W. Davies and E. M. Davies; that the last marriage was therefore void and J. W. Davies and E. M. Davies are illegitimate children of the deceased having no interest in his estate; that appellants, their mother having died, are the only lawful heirs of deceased; that letters of administration granted to appellee are illegal and void, because they

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were granted upon the petition of J. W. Davies and E. M. Davies; that the petition for the appointment of the administrator wholly failed and omitted to state that appellants were the only lawful heirs of the deceased, and the letters of administration therefore procured by fraud.

The deceased had lived many years in Morgan County, Illinois, and J. W. Davies and E. M. Davies were born, and have ever since lived, in this country and the petition fails to state that they had any knowledge whatever of their father's alleged former marriage or the existence of appellants. So far as the petition of appellants and the record in this case show, the appointment of appellee as administrator was made in the utmost good faith. There is no basis in the petition whatever for the claim that any actual fraud was practiced in the procuring of the appointment of appellee as administrator. Appellants being non residents, neither of one of them had the right to act as administrator nor to nominate an administrator. In **Re Estate of McWhirter**, 235 Ill. 607. If it should prove to be a fact that appellants are the lawful heirs of the deceased then the only effect thereof would be that it might be proper to appoint the public administrator as administrator of the estate. At the present time the letters

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of administration granted to appellee are conclusive of his authority until set aside or annulled by a direct pro-

ceeding for that purpose. The proceeding to sell real-estate to pay debts is collateral to that for the appointment of an administrator. **Thomas v. Waters**, 122 Ill. App. 434. The fact that an administrator may not have been lawfully appointed does not have the effect of abating the proceedings to sell real estate for the payment of debts, and even if an administrator is removed after a petition has been filed to sell real estate to pay debts the proceeding is only delayed until a properly qualified administrator shall be appointed to proceed. **Steele v. Steele**, 89 Ill. 51.

Appellants were made parties to the petition to sell the real estate and being non residents were duly served by publication and the mailing of notices in conformity with the statute. They did not appear on the hearing of the petition and were defaulted. They aver in their petition that appellee knew that they had attorneys in this country who were prosecuting their claim to establish heirship in a proceeding in the Circuit Court and that he should have notified said attorneys of the pendency of this petition. Appellee did everything the law required him to do in procuring service on the appellants, it was not necessary for him to serve a summons on appellants' attorneys or

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otherwise notify them of the proceedings in the Probate Court.

It is further objected that the decree is bad because it finds that the deceased died "having claim or title to the premises sought to be sold", and did not find the actual title to the lands he died seized of. The decree follows the language of the statute in this respect and is sufficient.

It appears that the deceased left a large estate in real estate and that a small portion thereof must be sold to pay the debts and this must be done whether appellants are lawful heir or whether appellee was lawfully appointed administrator.

We find no reversible error in the record and the order of the County Court is therefore affirmed.

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7-1-167

GENERAL No. 6467. OCTOBER TERM, A. D. 1915. AGENDA No. 40.

A. T. HOOPER, Appellee,

vs.

KASKASKIA LIVE STOCK INSURANCE
COMPANY, Appellant.

Appeal from

Circuit Court

Christian County

ELDREDGE, P. J.

This suit was brought by appellees before a Justice of the Peace to recover for the loss of two horses claimed to have been insured by appellant. On an appeal to the Circuit Court a jury was waived and a trial had before the Court upon a stipulation of facts and oral testimony. The trial Court found the issues joined in favor of appellee and rendered judgment for \$200 against appellant.

On December 5th, 1914, ^{plaintiff} ~~appellee~~ signed an application addressed to ^{defendant} ~~appellant~~ for insurance on seven of his horses. He paid the full amount of the premium to ^{defendants} ~~appellant's~~ agent and the latter sent the application with the premium to ^{defendant} ~~appellant~~. On the afternoon of Monday, December 7th, the policy was issued and mailed to ^{defendants} ~~appellant's~~ agent at Edinburg and was received by him on

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^{plaintiff} ~~appellee~~ had a veterinary surgeon attend some of his horses who were at that time sick, though it ~~does~~ not appear clearly from the stipulation of facts whether any of the horses which were sick at that time were included in the application or policy. It ~~does~~ appear, however, that the veterinarian did examine the two horses involved in this suit, Bird and Cola, and claims ^{that he} found nothing wrong with them, but on the next day the veterinarian again returned and treated Bird and Cola for corn stalk disease. On Wednesday, the 9th, ^{plaintiff} ~~appellee~~ had two veterinarians who treated Bird and Cola at that time for corn stalk disease and about noon on that day the horse Bird died and that night Cola died. The application for insurance contained, among other things, the following question and answer: "22. Do you agree to notify this company at once in case of sickness or accident? 22. (Answer) Yes." The application also contains the following provisions: "It is agreed that the policy, if issued hereon, shall be based upon the foregoing information, and answers of the applicants herein contained as they are written in this application. It is agreed that this application shall become a part of the policy, if accepted at the home office, and a policy issued thereon. * * * It is agreed that the policy based on this application shall not be in force until it

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has been paid for and delivered to the insured, which must be while the



animal or animals it is intended to cover are in perfect health and condition."

The policy contains, among other provisions, the following: "3. That in the event of such animal or animal sickness, or an accident, arising from any cause whatever, it shall be the duty of the insured to immediately procure the services of a veterinarian and use every possible means to save the life of said animal or animals. NOTICE OF SICKNESS OR ACCIDENT MUST BE GIVEN TO THE HOME OFFICE AT SHELBYVILLE, ILLINOIS, DIRECT, AND NOT THROUGH AGENTS, which notice shall be by telegram or telephone, and confirmed by letter within twenty-four hours thereafter. The failure to perform any of the requirements above mentioned as embodied in this paragraph, if death should ensue, shall release this company from any and all liability under this policy.

"16. That it is agreed that this policy shall not be in force until it has been paid for and delivered to the insured; THE DELIVERY MUST BE WHILE THE ANIMAL OR ANIMALS IT IS INTENDED TO COVER ARE IN PERFECT HEALTH AND CONDITION."

After the horse Bird died, appellee called up appellant's agent and notified him of the fact that this horse had died and also that Cola was very sick and was expected to die. At this time

(Page 3).

the agent told appellee that he had received the policy. On December 10th after both horses were dead, the agent for some unexplained reason delivered the policy to appellee. Appellee gave no notice of any kind to appellant company of the sickness of either of these horses and the latter had no knowledge thereof until after they were dead. Appellant refused to pay for the loss and returned the amount of the premium to appellee, which the latter received and has retained and has made no offer or tender of the same back to appellant.

It is urged by appellant, first, that the policy is void on the ground of the falsity of certain answers made by appellee in the application which purports to show that he stated that a certain horse Maude was at the time of the application "in first class shape" when, as a matter of fact, this horse had been sick for some time prior to and was sick at the time of the application; also that appellee, in his answers to other questions in substance stated that none of the horses in the application had been sick within twelve months; second, that the facts disclosed by the stipulation and the oral testimony show collusive fraud between the agent and appellee; third, because appellee never notified appellant of the sickness of these horses in accordance with the terms of the application and policy; fourth, because there never had been a delivery of the policy.

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As to the first and second contentions of appellant there was a conflict

of evidence and as the trial Court found for appellee we are not disposed to find contrary thereto though the evidence strongly supports the conclusion of collusive fraud.

A provision in a policy of live stock insurance requiring the insured to notify the company without delay of the illness of the animals insured has been declared to be a reasonable one. **Illinois Livestock Insurance Co. v. Johnston v. N. W. Livestock Ins. Co.**, 107 Wis. 337; **Swain v. Security Ins. Co.**, 165 Mass. 321. The application expressly stated that the policy if issued thereon should be based upon the information and answers contained therein. Appellee by his answer to the 22nd question in the application agreed to notify the Company at once in case of sickness or accident. Substantially the same provision is in the policy. Appellant received no notice of the sickness of these horses until after they were dead. If appellee had notified appellant when these horses were taken sick undoubtedly the application would never have been accepted as the policy at that time had not been executed by appellant. By failure to give the required notice appellant

(Page 5)

had a right to return the premium and declare the policy void and the question whether there was a lawful delivery of the policy by the agent is immaterial.

The judgment is reversed.

(Page 6)

EDWARD B. TAYLOR and WILLIAM B. TAYLOR, Partners - Doing Business as TAYLOR BROTHERS, Appellees,

vs.

CHARLES T. FOLEY, Appellant.

Appeal from
Circuit Court of
Vermilion,
County

ELDRIDGE, P. J.

This is an action on the case against James Berry and Charles Foley for fraud and deceit in wrongfully and fraudulently procuring appellees to pay three drafts drawn on them, each executed by Berry and payable to the order of Foley for the payment of horses purporting to have been bought by said Berry from Foley. The first draft is dated July 23, 1912, for the sum of \$140. The second is dated September 30, 1912, for the sum of \$390, and purports to be in payment for two horses. And the third is dated November 25, 1912, for the sum of \$350 and also purports to be in payment for two horses. The drafts are charged to the account of Taylor Brothers, Danville, Illinois, payable through the Palmer National Bank. The cause

(Page 1)

was submitted to the Court for trial without a jury, who found the issues joined in favor of appellees and assessed their damages at \$975. Foley alone appeals.

Appellees at the time the drafts were drawn on them were conducting a sales barn in Danville, Illinois, where horses and mules were sold on commission by them as commission merchants for anybody who had such stock for sale. They had a regular charge for such commission of \$3 a head and 50 cents a day for feed while the horses were kept in the barn. Berry bought horses to be sold by appellees in this way under an arrangement with them that he could buy horses anywhere he wanted to, using his own judgment, and ship them to appellees at Danville where the latter would put them in their sales barn and sell them on one of their sales days; that Berry, when he bought the horses, could draw drafts on appellees for the purchase price thereof and for such incidental expenses as would occur in buying and shipping them. The evidence shows that after each horse so bought by Berry was sold by appellees, a feed bill, shoe bill, freight bills and commission charges on the sale, were charged to Berry on appellees' books and deducted from the sale price, and that Berry received all the net profits on the sale, if any, and paid all the losses on the sale, if any; that this method was pursued

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with all the horse buyers who bought horses to be sold at appellees' barns; that public sales

7. 2
were had every second Friday.

There is substantially no controversy in regard to the facts. Foley testified that he lived in Paris, Illinois, and had been for many years in the carriage and automobile business; that he was acquainted with Berry and had sold him some horses prior to the time in controversy; that on July 23, Berry came to him at his place of business and stated that he desired to buy a horse from a dealer whom Taylor Brothers did not want him to buy from; that Taylor Brothers would not honor his draft for the payment of the horse if given to such person and requested appellant to give him a check for \$140, in return for which he would give him a draft on Taylor Brothers for a like amount. Foley gave him his personal check for \$140 and Berry executed a draft on Taylor Brothers for a like amount, payable to the order of Foley on which was written "For 1 horse". In regard to the second draft for \$390, Foley testified that on September 30 of the same year Berry came to him again at his place of business and stated that he wanted to buy three horses from the same dealer that he spoke of on the first occasion, that Taylor Brothers would not permit him to buy from that dealer and again requested that appellant give him his check, in exchange

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for which he executed the second draft mentioned. In this transaction appellant gave Berry two checks, one for \$330 and one for \$55.50, these totaling \$385.50, while the amount of the draft was \$390. In explanation of this variance in the amounts appellant testified that Berry told him that \$330 was to pay for a team of horses and that a single horse was to cost about \$50 or \$60 and that the second check of \$55.50 was for the purchase of the single horse, but that the difference between \$385.50 and \$390, or \$4.50, was the amount of a repair bill that Berry owed him for repairing his buggy. This draft for \$390 purports to have been given in payment for two horses. He further testified that on November 25th a substantially similar transaction with Berry took place with the exception that he exchanged his check for \$350 for the draft on Taylor Brothers for a like amount, which also purported to have been given for the payment of two horses. Foley further testified in substance, "He (Berry) gave me an excuse on each of these three occasions that Taylor Brothers did not want him to buy horses of this dealer, and in order to keep them from knowing where he was buying them, he wanted me to let him have my check, and on that statement I took these drafts and gave him the three checks that I have identified. I didn't sell him any of the horses mentioned in the drafts." The evidence shows that Berry

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did not purchase any horses from anybody with the money procured from Foley in exchange for these drafts, but appropriated it to his own use.

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cu) Appellant advances two contentions why the judgment should be reversed. First, that the evidence shows that Berry was the agent of appellees for the purpose of buying horses for them and that he had authority to execute the drafts in question; and, second, that the evidence does not show that Foley was guilty of any fraud or deceit. We do not think either of the contentions can be sustained. Foley testified that he had prior to these transactions sold Berry horses and bought horses of him. He does not testify that he ever knew of Berry ever drawing any drafts upon Taylor Brothers in payment for any horses bought from him. There is nothing in the evidence which tended to show that Foley had any knowledge of any facts that could lead a reasonable man to presume that Berry was acting as the agent for appellees in the purchase of horses or that as such agent he had authority to pay for them by executing such drafts. According to his own testimony these drafts were executed for the very object of deceiving appellees and for a dishonest purpose. Even if he considered Berry as an agent for appellees, Berry had told him that he was not authorized, but in

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fact forbidden, from purchasing horses from the dealers from whom he intended to buy them, and with this knowledge appellant assisted him in violating his express instructions as such agent, if he was an agent. The transaction between Berry and Foley was at least a constructive fraud upon appellees. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues, although the motive from which the representations proceeded may not have been bad. Nor is it necessary that they were made with a design or intention to cause injury to the other party. Case v. Ayers, 65 Ill. 142; Nalte v. Reichelm, 96 Ill. 425.

The court did not err in its rulings on the propositions of law and fact submitted.

The judgment of the Circuit Court is affirmed.

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GENERAL No. 6471. OCTOBER TERM, A. D. 1915. AGENDA No. 43.

THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,
vs.

LYMAN MOORE,

Plaintiff in Error.

Writ of Error
to County Court
of
Christian County

ELDRIDGE, P. J.

This writ of error is prosecuted to reverse a judgement of the County Court of Christian County finding plaintiff in error guilty upon one count of an indictment for selling liquor in anti-saloon territory and imposing a fine of \$100 and costs.

On the trial the Court permitted to be introduced in evidence over the objection of the plaintiff in error a written notice which, after the title of the cause was as follows:

"To Mr. Lyman T. Moore, President of Antler's Society: You are hereby notified to produce on the trial of the above cause in the county court of Christian County on Monday June 21st, 1915, a certain internal revenue special tax stamp issued to the Antlers Society, L. T. Moore, President, as retail liquor dealer on July 1st, 1914, and date of payment of which is July 24th, 1914, Number
(Page 1)

47429, otherwise the plaintiff will appear in said court at said trial and ask for a peremptory order for the production of the same, and will offer secondary evidence of the same. Harry B. Hershey, State's Attorney in and for said Christian County, Illinois." On the back thereof was the following: "Served the within notice on the said defendant, Lyman Moore, this 17th day of June, A. D. 1915, by reading and delivering a true and correct copy of the same to said defendant. E. H. Barnes, Sheriff. J. E. Downs."

The Court also allowed in evidence over the objection of the plaintiff in error a subpoena **duces tecum**, served upon the plaintiff in error, together with a certificate of service thereon, requiring him to produce said internal revenue special tax stamp and receipt as set out in the foregoing notice.

Section 17 of the Act providing for the creation by popular vote of anti-saloon territory, commonly called the Local Option Act, in force July 1st, 1907, provides that the issuance of an internal Revenue special tax stamp or receipt by the United States to any person as a wholesale or retail dealer in liquors or in malt liquors at any place within the territory which at the time of the issuance thereof is anti-saloon territory shall be **prima facie** evidence of the sale of intoxicating liquor by such person within such territory where such stamp or receipt is posted

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and at the time charged in any suit or prosecution under the act within the life of such stamp or receipt. While this stamp tax was issued to "The Antlers Society, L. T. Moore, President," the theory of the prosecution was that the Antlers Society was a myth and only existed in the person of the

plaintiff in error and that the tax stamp was **prima facie** evidence of plaintiff in error's guilt, and it is only upon that theory that the tax stamp itself or a certified copy thereof could have been offered in evidence as a fact tending to show **prima facie** evidence of the violation of the Act on the part of plaintiff in error.

Section 10 of Article 2 of the Constitution provides that no person shall be compelled in any criminal case to give evidence against himself. A witness is not bound to answer any question which might expose him to any penalty or have a tendency to accuse him of any crime of which will be a link in a chain of evidence to convict him of a criminal offense, and whenever a witness is excused from giving testimony upon such grounds he cannot be compelled to produce books or papers which will have the same effect. **Lamson v. Boyden**, 160 Ill. 613. **Manning v. Mercantile Securities Co.**, 242 Ill. 584. The service of the notice and subpoena upon plaintiff in error to produce this stamp tax was a violation of his constitutional rights and the introduction

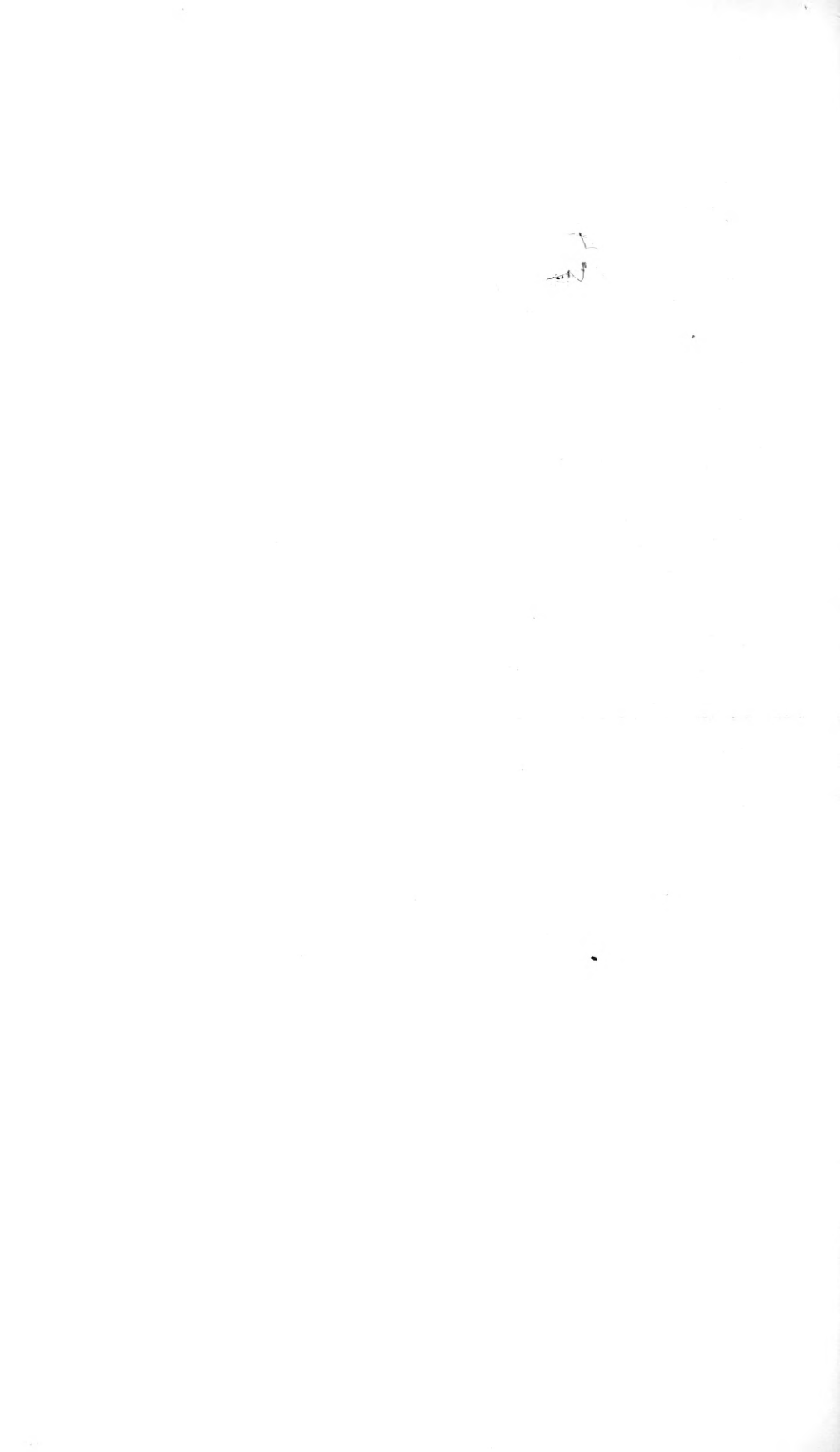
(Page 3)

in evidence of the notice and subpoena before the jury was an attempt to prove that he was possessed of such a stamp by evidence that was wholly incompetent under any rules of evidence.

The Court also over the objection of plaintiff in error, permitted the official court reporter to testify that she reported the testimony in the case of **People v. Josh Bird** in the County Court, that plaintiff was a witness in that case and that the following question was asked of him: Q—For whom, if anybody, was he working?" To which he answered. "Well, he was working for me I suppose." There was no preliminary proof to show how in any manner the question and answer could have been competent, relevant or material to any issue in this case.

For the errors indicated the judgement of the County Court is reversed and the cause remanded.

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CARL HINTON,

vs.

RUDOLPH MUHLMAN,

Appellee,

Appellant.

Appeal from
Circuit Court
Champaign
County.

ELDREDGE, P. J.

Appellee recovered a judgment against appellant for \$1750 damages in an action for assault and battery, to reverse which appellant prosecutes this appeal.

The declaration consists of three counts and the first alleges that on February 27, 1914, appellant assaulted appellee with force and arms and with a certain pitch fork struck him upon the back of the head, whereby he was greatly and permanently injured and did necessarily lay out large sums of money, to wit, \$500 in and endeavoring to be healed of his wounds, etc; the second charges that appellant on said day with force and arms made an assault upon appellee and then and there beat, bruised, wounded and ill treated him and other wrongs to him

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then and there did against the peace of the people, etc; the third, after alleging that appellant struck plaintiff on the back of the head with a heavy club or implement commonly known as a pitchfork, avers that plaintiff was immediately thereby rendered sick, etc., and partially blinded by the blood from said wound and incapable of muscular co-ordination and while in such condition appellant procured a shot gun, pointed it at appellee and with a loud voice and menacing tone informed appellee that he would shoot and kill him and did fire off said gun once in the direction of appellee and was then and there attempting to shoot appellee when bystanders interfered and restrained him from further firing off said gun, by means whereof appellee sustained an injury to his head and his mental and nervous system and became and was greatly shocked and prostrated, etc., and that he laid out divers sums of money amounting to, to-wit, \$500 in attempting to be healed, etc.

Appellant filed four pleas; (1) the general issue; (2) self defense of his person against an assault upon him by appellee, in the usual form; (3) that on divers and different times prior to the time in question appellee had to divers persons made threats that he would kill appellant and would do him great bodily injury, that appellee was a young man thirty

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years of age, strong physically and that just before the alleged assault was committed came upon the premises of appellant and with

force and arms made an assault upon him and would then and there have beaten and bruised and injured appellant had appellant not immediately defended himself, etc; and (4) that appellant was seized and possessed of a close and freehold on which there was then and there situated certain property of appellant, to-wit, 100 shocks of corn; that appellee came upon said premises and announced his intention of forcibly taking possession of certain shocks of corn and of carrying the same away and converting the same to his own use and did then and there attempt to carry away said corn; thereupon appellant defended his property against the unlawful trespasses of the plaintiff, etc.

Appellant owned a farm in Champaign County and had leased the same to appellee. The term of the lease expired March 1st 1914. Appellant lived in a dwelling house on the farm and appellee lived in another house thereon a few rods east of appellant's residence on the same side of the road and immediately adjoining the lots and enclosures about appellant's dwelling. About a quarter of a mile east of the house where appellee lived were a watering tank and pump. The tank was located in the line

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of the fence so that a portion of it projected in such a way that horses and other animals could drink therefrom while on the highway, and the other portion of the tank, together with the pump, was located on the other side of the fence within the field. About 15 feet from the watering tank was a gap in the fence and across this gap were barbed wires, one above the other, which were fastened at one end to a post in the fence and at the other end to what was called a gap stick. The gap was closed by putting the bottom end of the stick into a loop of three barbed wires, one above the other, which were fastened at one end to a post in the fence and at the other end to what was called a gap stick. The gap was closed by putting the bottom end of the stick into a loop of wire which was attached to the post at the end of the gap and then drawing the top of the gap stick up to the post and fastening another wire loop over the top of the stick to hold it. This gap could thus be opened by raising the stick out of the wire loop at the bottom or by taking the loop off at the top. About five o'clock on the morning of February 27th, 1914, two days before the lease expired appellant started down to the highway to break the ice in the tank so his stock could get water. On his way in passing appellee's house he saw the latter in the yard and had a conversation with him. The versions of this conversation differ somewhat, but the substance of it was that appellant requested appellee to haul a load of oats to Lotus for him that day, which appellee refused to do, stating that he was

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going to move his two loads of fodder down to the other place which he had rented. The fodder mentioned was some

corn that had been cut and placed in shocks and had not been husked. Appellant told appellee that he wanted him to shuck out the corn before he moved the fodder. Appellee stated that he was going to move his share of the fodder that day as he had made arrangements to do so and appellant replied that he should not do so. Appellant then left and went down the road toward the watering tank carrying a pitchfork with him. He took the pitchfork, he claims, for the purpose of breaking the ice and removing it from the tank. Between eight and nine o'clock appellee hitched one team of horses to his wagon and his hired man Hennigh took another team which was not hitched to a wagon, and both drove down to the gap in question. On the wagon appellee had placed a pair of double trees, a log chain, a tile spade, an ax and a shot gun. When appellee and Hennigh reached the gap appellant was inside the field by the watering tank. Appellee unhitched his horses from the wagon, crawled through the fence and pumped some water in the tank for his horses to drink. When this was done he crawled back through the fence, hitched his horses to the wagon and started on foot toward the gap or gate. Appellant at this time was stand-

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ing inside the gap leaning on his pitchfork. Appellee proceeded to remove the loop from the gap stick so that he could open the gate. Again there was a conflict in the evidence as to just what was said by appellant and appellee at this time, but it is evident that the substance of it was that appellant told appellee he could not enter and take the corn and that appellee said he intended to do so. While appellee was attempting to open the gate appellant struck him a violent blow on the back of the head with the pitchfork. ^{Plaintiff} Appellee fell to his knees, got up, ran toward and past the wagon and was followed by ^{defendant} appellant until the latter got to the rear end of the wagon when he reached the pitchfork into the wagon and by means thereof drew out ^{plaintiff} the gun. When ^{defendant} appellee saw that ^{plaintiff} appellant had taken the gun out of the wagon he stopped running, held up his hands and asked not to shoot him. ^{Plaintiff} Appellant discharged the gun into the ground, handed it to ^{defendant} Hennigh and walked away from the scene of the trouble. ^{Plaintiff} Appellee attempted to drive his team into the field but fell to the ground and was taken back to his house by ^{defendant} Hennigh. He became unconscious and delirious and was confined to his bed for several days. ^{Plaintiff} The evidence tends to show that it was several months before he could do any work; that he has since suffered with headaches, pain in his left kidney and in his spine and with

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sleeplessness; had a numb sensation in the back of his head, and his left arm was very sore; he could not dress himself for three of four weeks; that he has lost about 40 pounds in weight and his voice has become low and weak.

It is first urged that the Court erred in admitting the lease in evidence. By the fourth plea appellant put in issue his justification for the assault and battery on the ground that it was necessary in defense of his property against the trespass thereof by appellee. Appellee was attempting to enter the field in question, as he claims he had a right to do, under the terms of his lease which had not yet expired. If he had been a mere trespasser and was attempting to go upon the premises to remove property of appellant without any right or title thereto and against appellant's commands, appellant would have been justified in protecting his property against the trespass. The lease was proper to show the relations of the parties and their respective rights in regard to their interests in the premises and the crops thereon in question at the time.

The Court permitted, over appellant's objection, the introduction of evidence tending to show what real estate appellant owned and the value thereof. Two reasons are urged why this evidence was improper. first because it was not accompanied or

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followed by any evidence tending to show what mortgage indebtedness, if any, was on the land; and second that such evidence is only competent in cases where vindictive or exemplary damages are allowable and that there is no evidence in this case which would warrant a jury in assessing exemplary damages. It has been the settled law of this state that in all cases where exemplary damages are recoverable the pecuniary resources and financial condition of the defendant are elements for the jury to consider in estimating and assessing the damages. **McNamara v. King**, 2 Gilm. 432; **Cochran v. Ammon** 16 Ill. 316; **Peters v. Lake**, 66 Ill. 206; **White v. Murtland**, 71 Ill. 250; **Schmitt v. Kurrus**, 234 Ill. 578. Appellee by proving the ownership of these lands in appellant made out his **prima facie** case of the financial condition of appellant and this was all he was required to do. If there was any mortgage indebtedness thereon the burden was upon appellant to prove that fact, and also any other facts which might tend to show that his financial resources were not as great as shown by the **prima facie** case of appellee. Appellant introduced no evidence tending to show that his financial condition was other than or different from that established by the evidence introduced by appellee. The second objection to this evidence cannot be sustained. Appellant struck appellee while the latter

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was attempting to open the gate for the purpose of going into the field, which he had a right to do by virtue of his lease. There is no evidence tending to show that he assaulted appellant or made any attempt to do so. Appellee's purpose was to go into the field and remove that part of the shocked corn which belonged to him. There is no evidence tending to show that he intended to take any property which belonged to appellant, but appellant's position is, that appellee had no right to remove

his own corn until he had husked that belonging to appellant. There was no such condition in the lease or duty imposed upon appellee to first husk appellant's corn before he removed his own, but even if this had been the case, such fact would not justify appellant in striking appellee on the head with a club or pitchfork. It is true that appellant testified that while appellee was attempting to open the gate his arm was scratched by one of the barbed wires attached to the gap stick and this is claimed to have been an assault upon him by appellee which justified appellant in striking appellee as he did. This was a question of fact for the jury to determine from the evidence. When an assault and battery is made wantonly and wilfully, or maliciously, or with undue violence, exemplary damages are authorized, and malice will be inferred where the act is done with a reckless disregard

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of the rights of the person assaulted
Chicago Traction Co. v. Mahoney, 230 Ill. 562, and cases cited. The evidence introduced on behalf of appellee tended to show that the act of appellant was wanton and malicious and the evidence introduced of the financial condition of appellant was therefore proper.

The witness Ira Bunn testified that he sat up with appellee one night three or four days after the latter was injured and that appellee at that time was lying on the lounge. In answer to a question how appellee slept he answered as follows: "Well, it was the only way I know to express it, that he didn't sleep good, about every hour or sometimes half hour he would arouse and at one time he raised up on the lounge just like he wanted to get up and his sleep was broken that night right along." The witness George Bunn stated that he stayed with plaintiff the second night after the injury and in answer to a question said, "Well, he would go to sleep for a few minutes and then he would wake up and throw the covers off and then complain of his back and arms." The witness Zimmer saw appellee in his house shortly after the assault and in answer to a question as to what was his condition, stated, "He was lying on the lounge, sort of on one side, and Mr. W. S. Hinton and the doctor were trying to dress a wound on the back of his neck. Mr. Muhleman's wife

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was bathing his feet in hot water and he was in terrible agony." Appellant made a motion to exclude the above answers and also several other answers of more or less similar character given by other witnesses, on the ground that the symptoms testified to were subjective in some instances and in others conclusions only. Assuming that these answers were incompetent and should have been excluded, they tended to prove nothing except the extent of appellee's injuries and were only pertinent to the question of damages. The error, if any, in refusing to exclude them is not sufficient to reverse the judgment for

reasons which will be hereinafter mentioned.

Every instruction given on behalf of appellee is criticised and it would extend this opinion beyond any legitimate length to discuss each one. The eighth instruction given on behalf of appellant is as follows: "The Court instructs the jury that if the jury believe from the evidence in this case that the defendant did unlawfully assault the plaintiff and strike the plaintiff, then it would be the duty of the jury to find the defendant guilty, and under such state of the proof the plaintiff will be entitled to recover as a matter of right, such damages as will compensate him for the injury received by him from the defendant, such damages as are known in law as actual damages,

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and will include an amount sufficient to compensate the plaintiff for his pain and suffering, if any is shown by the evidence, his loss of time, if any is shown by the evidence, his expense in caring for his wounds, if any is shown by the evidence, and any injury which the evidence may show has resulted to his health or physical condition as a result thereof, or as such damages may be shown by the evidence in this case, and it is not necessary that the evidence in this case in order for the plaintiff to recover the said actual damages, that the evidence should show the amount of such damages in figures of monetary value, but that the amount of said damages are to be fixed by the jury from all the evidence in the case, and in addition to all such damages as may be shown by the evidence in this case, the jury have the right, in case you believe the plaintiff is entitled to recover such actual damages, to award to the plaintiff in addition to such actual damages, what is known in law as vindictive damages or punitive damages, provided you find from the evidence said injury was wantonly or wilfully inflicted by said defendant, and under such state of the proof the jury are not confined to the amount of damages actually proved to have been sustained by the plaintiff, but may assess damages in their discretion not exceeding the amount claimed in the declaration."

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It is first insisted that this instruction allows the jury to determine what is an unlawful assault. The statute itself defines an assault and battery as "The unlawful beating of another." Twelve instructions were given on behalf of appellee and fourteen on behalf of appellant. Substantially every phase of the law in regard to assault and battery is covered by these instructions, and the first and eleventh given on behalf of appellant fully define these terms. The jury were well informed as to what was an assault and battery by the other instructions and it was unnecessary to repeat the same definition in every instruction. It is next urged that the instruction is erroneous because it states that in order for appellee to recover his actual damages the evidence need not show the amount of such damages in figures of monetary value. There was

evidence of what plaintiff paid and became liable to pay for the services of his physician. When damages are of such a character as to be susceptible of being proven by direct and positive evidence, such proof must be made showing the exact amount thereof. This class embraces liabilities to physicians incurred or paid in attempting to be cured of the injuries and are susceptible of positive proof. The physician who attended appellee in this case testified that his services were reasonably

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worth \$50 and the evidence shows that appellee had paid of this amount \$4.50. The instruction permits a recovery for the amount of the physician's bill which appellee had not paid but which he had become liable for, and is erroneous in this respect because the declaration contains no allegation that appellee became liable for any such damages. **N. Chicago Street Ry. Co. v. Cotton**, 140 Ill. 486. While not only the expenses necessarily paid by one injured in endeavoring to be cured but also all like expenses that he may have incurred or become liable for can be recovered, yet no recovery can be had for expenses incurred and not paid unless they are set out in the declaration as an element of damages. This instruction in the respects mentioned is erroneous, but at most could not have injured appellant in a greater amount than the unpaid balance of the physician's fees, which was ^{45.50}~~\$35.50~~. Although the instruction has other defects, as they have not been complained of they are considered waived. We do not think that the giving of this instruction nor the refusal to exclude the erroneous evidence herein above mentioned should cause a reversal of the judgment. In the case of **Amann v. Chicago Consolidated Traction Co.**, 243 Ill. 263, the plaintiff was permitted to testify that he had paid \$800 since he was injured, for doctor's bills and treatments, without giving any particulars as to amounts or persons to whom the moneys were paid and

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without proof that the treatments were necessary on account of the injuries for which he sued. Other incompetent evidence was also admitted bearing upon the extent of the plaintiff's injuries. The trial Court before overruling the motion for a new trial compelled the plaintiff to enter a remittitur. The Supreme Court in reviewing the case and referring to the errors in the admission of the evidence, held:

"Notwithstanding these errors we are of the opinion that the judgment should not be reversed. The errors did not in any manner affect the question of the liability of the defendant, in which case a remittitur would be of no avail to obviate them, (**Wabash Railway Co. v. Billings**, 212 Ill. 37,) but they related only to the amount of damages. While the defendant had a right to the judgment of the jury as to the amount of damages

on legitimate evidence, it has frequently been held that an error affecting damages, only, may be cured by a remittitur. Whether the remittitur required by the trial court would cure errors of this character on a question of actual damages or not, we are satisfied that any jury to whom the evidence in the case might be presented would assess damages equal to the amount of the judgment. The case was a proper one for the assessment of exemplary damages, (**Chicago Consolidated Traction Co. v. Mahoney**, 230 Ill. 562,) and in view

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of that fact we think the judgment

should be affirmed."

Appellee's twelfth instruction told the jury that there was no evidence in support of appellant's fourth plea, which was a plea of justification in defending the property of appellant. In this there was no error. Appellant's own statement of the facts did not tend to sustain this plea.

The defendant offered thirty-two instructions, of which the Court gave fourteen and refused eighteen. When a party litigant offers an unreasonable number of instructions for the trial court to pass upon, the trial court cannot be expected in the hurry of the trial to give them extensive consideration and the judgment will not be reversed for an error in refusing to give some of the instructions if upon consideration of those given it can be seen that the jury was fully informed as to the law of the case. **Clifford v. Pioneer Fireproofing Co.**, 232 Ill. 150.

It is urged that the Court erred in refusing to admit evidence of certain threats alleged to have been made by appellee against appellant prior to the date of the assault and some of them as remote as the summer of 1913. There is no evidence showing that appellee either by word or act was attempting to carry out any threats which he might have previously made.

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All that the evidence tended to show was that appellee was insisting on his right to open the gate in order to drive in and take what he claimed to be his share of the crops. Under these facts evidence of prior threats was incompetent. **Cummins v. Crawford**, 88 Ill. 312; **Murphy v. McGrath**, 79 Ill. 594; **Heffernan v. Lloyd**, 145 Ill. App. 583.

Other errors have been presented and argued as grounds why the judgment should be reversed which have not been mentioned herein but which we do not consider of sufficient importance to be discussed. The case of appellee could rest upon the testimony of appellant alone, which in itself shows that the assault was without justification and there is no error in the record of sufficient merit to cause a reversal of the judgment. Appellee was not entitled to recover the unpaid balance of \$35.50 physician's fees under the averments of the declaration. It will there-

fore be ordered that if appellee enter a remittitur herein for the sum
of ~~\$95.50~~ ^{168.75} within ten days the judgment will be affirmed for the sum of
~~\$144.50~~ ^{170.25} at the costs of appellant, otherwise the judgment will be re-
versed at the costs of appellee.

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WILLIAM F. KURTZ,

Appellee,

vs.

JOHN EVANS,

Appellant.

Appeal from
County Court of
DeWitt County.

ELDREDGE, P. J.

Appellee recovered a judgment against appellant in the County Court of DeWitt County for the sum of \$225.00 in an action of assumpsit for commissions earned in the sale of appellant's farm.

Appellant and appellee are farmers and neighbors. Appellant's farm consisted of 280 acres and he agreed with appellee to pay the latter \$225 commission if he would procure a buyer who would pay \$63,000.00 for the farm. It appears that appellee, in addition to being a farmer, at times acted as a real estate agent in the buying and selling of other farms. Mr. Charles Dittes and Miss Katie Renschler were brother in law and sister in law, respectively, living in Lincoln, Illinois, and together owned a farm near Skelton, Illinois. Mr. Dittes and

(Page 1)

Miss Renschler contemplated purchasing another farm and Dittes had a conversation with a real estate agent at Lincoln, who told him there were some farms for sale near Tabor, DeWitt County, where appellee lived, and that if he went in that vicinity, appellee would show him the farms. In this conversation he mentioned a farm called the Huffman farm, but did not mention the farm owned by appellant. Dittes and Miss Renschler knew of a farm being for sale known as the Marvel farm. Mr. and Mrs. Hutchcraft were the tennants on the farm owned by Dittes and Miss Renschler near Skelton, and on October 14th Dittes, Miss Renschler and Mr. and Mrs. Hutchcraft proceeded in an automobile to view the Marvel farm. In going to the Marvel farm they passed that owned by appellant. After examining the Marvel farm they drove to the home of appellee, and Dittes told the latter that the real estate agent in Lincoln had told him that appellee had some land for sale and would show it to him. They then proceeded to view the farms appellee had for sale. Appellee procured his automobile and Dittes rode with him. The others followed in the other automobile. Appellee took them to the Huffman farm, the Shipley farm and then to the Cunningham farm. He did not take them to appesllant's farm. Appellee testified that when they were

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returning, after having examined the farms mentioned, that he told Dittes that appellant's farm was for sale; that it was a good farm with improvements; that it had been clovered and was in good shape; that

in consisted of 280 acres and that the price was \$225.00 an acre. He also told Dittes about the Longbreak farm. Appellee further testified that he asked Dittes if he would like to see appellant's farm, but Dittes said that it was getting late, he wanted to get home before dark, that he would study the matter over and be back in a day or two to decide what he would do. On October 15th Dittes and Miss Renschler went to appellant's farm alone and examined it, with the result that they purchased it for \$63,000.00. The next day appellant told appellee that he had sold his farm.

It is contended by appellant that appellee was not the efficient cause for the sale of the farm for the reason that the purchasers received their information that his farm was for sale, its price, location, condition, etc., from Mrs. Hutchcraft before they ever met appellee. Both Dittes and Miss Renschler testified that when they started out in the automobile that day Mrs. Hutchcraft told them that appellant's farm was for sale for \$225 an acre, and as they passed it on their way to the Marvel farm, she pointed it out to them and they drove by two sides of

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the farm. Dittes testified that when they were returning after viewing the several farms on the evening of October 14th and after appellee mentioned that appellant had a farm for sale, he told appellee that he knew about that farm, that Mrs. Hutchcraft had told him all about it, but that it was too large. A careful examination of appellee's testimony fails to disclose any denial of this conversation with Dittes wherein the latter told him that he already knew all about appellant's farm and it thus stands uncontradicted. It appears from the evidence that Dittes and Miss Renschler were not satisfied with the Marvel farm, which they first examined themselves, nor with the several farms that appellee had shown them, but on the following day went by themselves to appellant's farm and after an examination thereof purchased the same. Under the above facts appellee could not have been the efficient or procuring cause for the sale. **West End Dry Goods Store vs. Maun**, 133 Ill. App. 544; **Hinds v. McIntyre**, 89 Ill. App. 611; **Morton vs. Barney**, 140 Ill. App. 333.

Upon the cross examination of appellee he was asked why he had not gone to appellant on the day he showed the other farms and asked appellant if he brought him a buyer whether or not he would pay him the commission. He gave the following answer: "A. I had been there two or three weeks before and had told the

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boy"—at this point of the answer appellant objected and disclaimed the answer about the boy, but the Court permitted the witness to proceed and the following answer was given: "A. I am telling why I asked the boy if his father would give me a commission, and the boy said 'father will treat you right.' " This answer ap-

pellant also disclaimed, which disclaimer was also overruled. This ruling of the Court was clearly error.

In the argument to the jury counsel for appellee made this remark, "This man here, this old gentleman, 79 or 69 years old, he is a business man, he is successful, and he is rich." Such statement was improper, vicious and could only have been made for the purpose of arousing the passions and prejudices of the jury and similar remarks have been repeatedly held to constitute reversible error.

The judgement of the County Court is reversed and cause remanded.

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JOHN H. McGLOTHLIN, Appellee,

vs.

HERMAN PETERS, Appellant.

Appeal from
Circuit Court
Sangamon
County

ELDREDGE, P. J.

This appeal is prosecuted to reverse the judgment in the sum of \$2500.00 rendered on the verdict of a jury in an action of trespass.

The declaration consists of a single count and charges that the defendant with force and arms assaulted plaintiff, and violently threw a certain glass bottle known as a beer bottle and then and there struck the plaintiff with the same on the head with great force and thereby knocked him down, whereby he became greatly hurt, bruised, wounded, etc., and other wrongs to the plaintiff then and there did, to the great damage of the plaintiff and against the peace of the people, etc. There is no count

(Page 1)

in case charging negligence.

It is first insisted that as the declaration charges assault and battery only and that as there is no evidence of any intention on the part of appellant to do harm that the cause of action cannot be maintained. *Gilmore v. Fuller*, 198 Ill. 130; *Paxton v. Boyer*, 67 Ill. 132; *Razor v. Kinsey*, 55 Ill. App. 605. This question is raised for the first time in this court. On the trial there was no motion to exclude the evidence, nor instruction offered upon this theory, but the whole defense in the trial court was that appellant did not throw the bottle and this new contention cannot now be raised for the first time in this court. *City of Mattoon v. Noyes*, 218 Ill. 594; *Ortmeier v. Ivory*, 208 Ill. 577; *McDavid v. Sutton*, 205 Ill. 544.

The third instruction given for appellee states in substance, that if the jury finds from the evidence that the defendant is guilty and that plaintiff has sustained actual damages, then if it further finds from the evidence that the alleged assault was made in a wanton and reckless disregard of the rights of plaintiff it is at liberty to impose, in addition to the actual damages, other and additional sums in the way of vindictive or punitive damages. The giving of this instruction is assigned as error, on the ground that there was no evidence on which to base an instruction allowing

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vindictive damages.

On the morning of November 2, 1914, appellant with his son as driver and John Walsh and William C. Gueswelle, his neighbors, motored in appellant's automobile to the farm premises of one Dan McCarty in Morgan County. Appellant and Walsh went to buy a large quantity of corn from

McCarty's tenant, Michael Johnson. Gueswelle had bought some cattle from Johnson before and went along to see if he could buy some more. In passing through the Village of Virden they stopped and purchased some sandwiches and four bottles of beer for a lunch. They took the sandwiches and beer with them in the automobile and proceeded to eat their lunch while they were travelling along the road. Walsh sat on the front seat with appellant's son, while appellant and Gueswelle sat on the rear seat. The men on the front seat had one of the bottles of beer and those on the rear seat had the other. As they were passing by appellant's farm about four miles northwest of Virden, one of the bottles, at that time empty, was tossed or thrown out of the car. Appellee at this time was standing in a gap in the hedge near the side of the road where he had been fixing a gate. When the bottle descended it struck him on the right side of the forehead near his hair, inflicting a wound an inch or more in length and to the depth of the bone and he was

(Page 3)

knocked down by the force of the blow. The automobile stopped within a short distance and all the persons in the car except the driver, appellant's son, got out and walked back to appellee. Appellant expressed his regrets to appellee, and offered to take him home or to a doctor. He wiped the blood from appellee's face, helped him into the car, and at the latter's request took him to his house about a quarter of a mile distant. Appellee was seventy-eight years old and hard of hearing. After he was struck with the bottle he became very angry and excited and told appellant and his companions that if he had a gun he would shoot them, and called them vile names. Appellant on the trial testified that he did not throw the bottle, but that it was tossed out of the car by Gueswelle, and Gueswelle also so testifies. The two men in the front seat did not see it thrown and there is no direct testimony that appellant threw the bottle.

Appellee testified that when the automobile was 30 or 40 yards from him the horn sounded; that when it arrived even with and not more than 10 feet from him, he was hit with the bottle, the force of the blow cutting a hole through his cap; that appellant was the first man to come up to him and said "Dad, I didn't mean to hit you with the bottle, come on out and we will take you home." On cross examination he testified that appellant

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said "I didn't mean to hit you, uncle, with the bottle; I aimed to throw at the gateway." And further, "Peters said 'We hit the old gentleman,' or 'I hit the old gentleman,' or 'The old gentleman got hit', I cannot state and don't know whether he said 'he' or 'I' ". Some days afterwards appellant went to Virden through some arrangement with appellee and telephoned to the latter at his home. Appellee also testified

that appellant said to him over the telephone, "If you will send your bill down I will settle it. I understood Mr. Peters to say 'I will settle', I might have been mistaken." The witness Kersimer at the time of the accident was working for appellee husking corn in the field and was 80 or 90 yards away from the parties at the time, and testified that he heard appellant say, "We have hurt the old man through a joke"; that he was paying close attention to what appellant said and that appellant did not say that he hit him with a bottle or that he hurt him. The witness Kline stated that he was in the telephone room when appellant was telephoning to appellee and that he heard appellant ask him how he was feeling; that he could not come out and see him, but he would like to have him make out a statement of what the damage and expenses were, send it to him and he would settle it; that he was awfully sorry it happened; that it was an accident; that they were just

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going along and just pitched the bottle out that he did not see appellee when he pitched the bottle out. On cross examination he testified that appellant at that time did not say he hit appellee with the bottle. Charles McGlothlin, son of appellee, testified that he was also in the room while appellant was telephoning to his father and on direct examination stated that he did not remember just what appellant said but that he said he was sorry it happened and asked his father if he could not come to town or if he could not to make out his bill and send it to him and he would settle it; that he did not remember that there was anything said about how the accident happened. On cross examination he stated that appellant said at this time that he did not see his father and that he aimed to throw the bottle at the gateway.

We do not think this evidence fairly tends to prove that appellant of anybody in the automobile saw appellee when the bottle was thrown, or that the bottle was thrown with any intention of harming him. Assuming that the evidence is sufficient to sustain the fact that appellant threw the bottle, there was no evidence that it was thrown with a wanton and reckless disregard of the rights of appellee. In the case of *Chicago Traction Co. v. Mahoney*, 230 Ill. 562, it was held: "The rule is, 'that to authorize the giving of exemplary or vindictive damages, either

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malice, violence, oppression or wanton recklessness must mingle in the controversy. The act complained of must partake of a criminal or wanton nature.' (*City of Chicago v. Martin*, 49 Ill. 241). If the assault be made with considerable provocation and without malice, yet if it is of a wanton, gross and outrageous character it will authorize exemplary damages. (*Drohn v. Brewer*, 77 Ill. 280; *Gartside Coal Co. v. Turk*, 147 id. 120). Malice being a question of fact and for the consideration of the jury, it is not necessary that express malice should be proved. If it ap-

pears that the party has acted with a wanton, wilful, or reckless disregard of the rights of the plaintiff, malice will be inferred. Farwell v. Warren, 51 Ill. 467; Donnelly v. Harris, 41 id. 126; 1 Sedgwick on Damages, (8th ed.) Secs. 363-367, inclusive; 12 Am. & Eng. Ency. of Law, (2d ed.) 23."

The mere throwing of the empty bottle from the automobile into the hedge along the side of a country highway where no persons are in view or where the one throwing the bottle might not reasonably expect any person to be present, is not such an unlawful act as to make it wanton or malicious or a reckless disregard of the rights of a person who might be struck therewith. The facts in this case were not sufficient to warrant a jury in assessing punitive damages, and the giving of the instruction

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was error.

The judgment is reversed and cause remanded.

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WILLIAM A. DYER, Et Al, Appellants,
Appellants,

vs.

WILLIAM E. HALL, Admr., Etc., Appellee.
Appellees.

Petition to Sell

Real Estate to

Pay Debts.

GRAVES, J.

This is an appeal from an order of the County Court of Morgan County entered on the 5th day of December, A. D. 1914 in the matter of the estate of William A. Dyer, deceased, granting the petition of William E. Hall as administrator **de bonis non** with the will annexed of that estate, to sell real estate to pay debts.

William A. Dyer died in February, 1880, leaving a widow, Harriet C. Dyer, several children, considerable property both real and personal and substantial debts both secured and unsecured. He also left a will. The only provisions in the will relating to his wife are as follows:

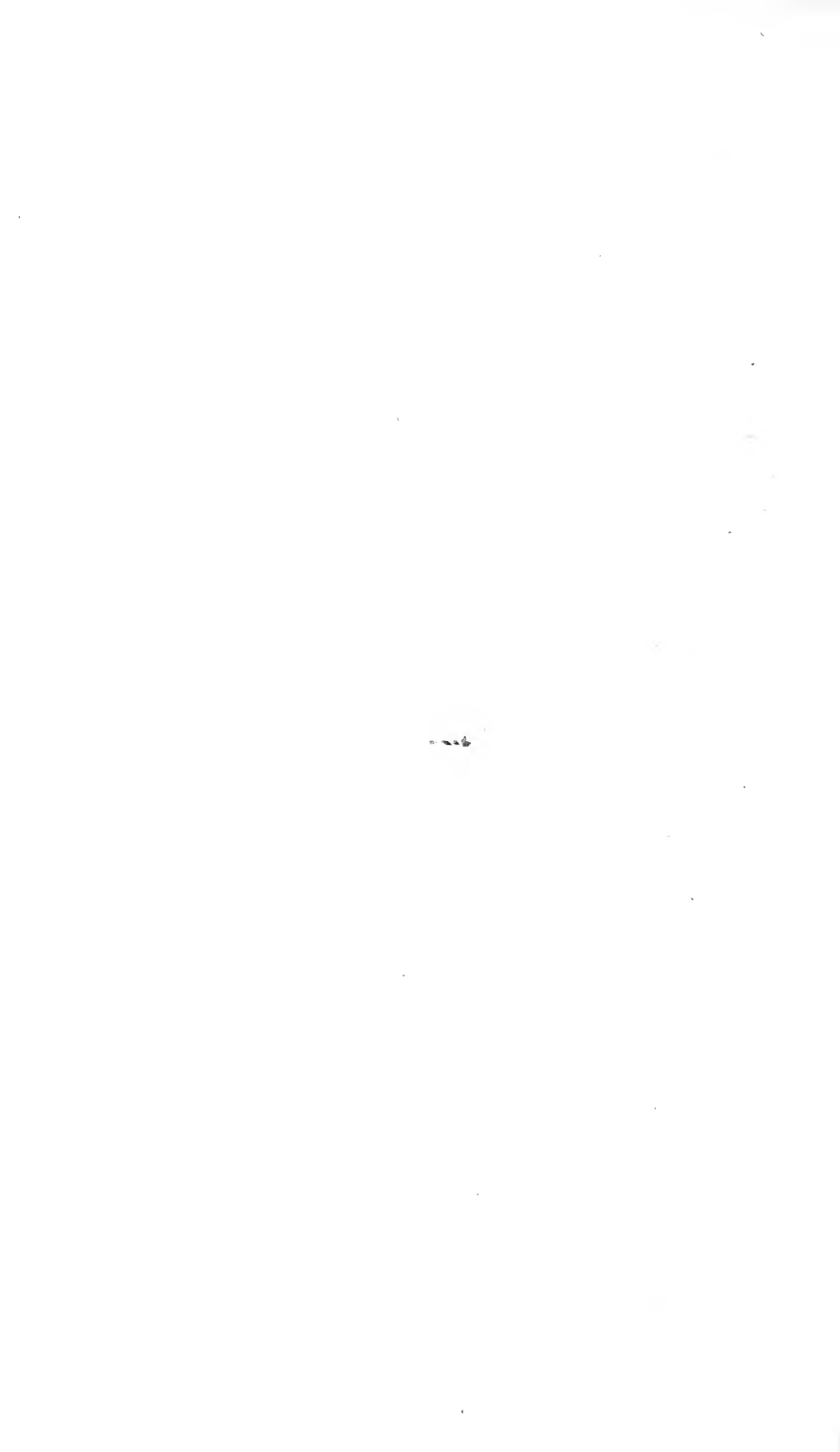
(Clause Fourth) "My will is that my beloved wife, Harriet C. Dyer, have full control of the real estate for the purpose of raising my children on, while she remains my widow. In case she should marry, then in that case she is to be an equal heir with my children."

(Clause Sixth) "I furthermore will that after my debts are paid, and when my youngest child is twenty-one years of age, then my real estate be sold and an equal division be made between my children, and should my wife remain my widow, then in that case she is to hold her dower right real estate during her natural life, but should she marry then in that case she is to have an equal division with my children as above stated."

Letters testamentary were duly issued on March 6, 1880 to Samuel Wood, the executor named in the will. In March, 1880, he sold the personal property. The May term 1880 was fixed as the time for the

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presentation of claims and due notice thereof was given by the executor. One James Ranson held a claim amounting with interest to more than \$4500.00, secured by a trust deed. This claim he presented to the County Court as a claim against the estate and the same was allowed. Out of the proceeds of the sale of the personal property the executor paid the preferred claims and a dividend on the seventh class claims both secured and unsecured. By this means a trifle over \$1100.00 was paid on the Ranson secured claim. Thereafter on June 28, 1882, Ranson secured a decree of foreclosure and sale of the premises covered by his trust deed to pay the unpaid portion of his claim. In that decree the court, having the will of the deceased and the trust deed before it and having jurisdiction of all the heirs, devisees and personal representatives of the deceased, decreed that the widow and minor children of the deceased were entitled to a homestead interest in the real estate of her husband, notwithstanding the provisions of those two documents, and caused the same



to be duly set off and allotted. Under that decree all of the real estate of the deceased, except the homestead so set off and about twenty-six (26) acres of farm land, was sold and produced about \$400 more than enough to pay the unpaid part of the Ranson claim and the costs of the foreclosure proceedings. This surplus was turned over to the executor of the deceased to be by him handled in the due course

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of administration. There still being insufficient funds in the hands of the executor to pay the allowed claims, he filed his petition in the county court for leave to sell the remaining 26 acres of land to pay debts. On April 4, 1883 that court entered its order setting off to the widow as her dower nine (9) of the 26 acres mentioned, and ordered the executor to sell the remaining 17 acres to pay debts. This order was carried out and on May 26th, 1883 he made a report to the County Court of the amount of funds in his hands and the amount of the unpaid debts and asked for an order of distribution of such funds and for an order relieving him from making further report until after the death of the widow. The Court approved the report, ordered the distribution, found that nothing further could be realized from which the unpaid claims could be liquidated until the termination of the homestead estate and ordered that the executor be excused from making further reports "until the termination of the life estate of the widow." The widow died November 18, 1913. The executor of her husband's will had died many years before that time. On February 24, 1914, ^{the petitioner} ~~appellee~~ having been appointed administrator **de bonis non** with the will annexed, filed his petition for leave to sell the lands previously set off to the widow as her homestead and dower interest, to pay the balance of the claims allowed against the estate, after due credit had been allowed thereon for all the moneys that had come

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into the hands of the executor for that purpose, whether the same had been so applied or not. The prayer of that petition was granted, and the lands in question were ordered sold. It is that order this appeal is prosecuted to reverse.

The reason urged by appellants in their argument for such reversal is, that the creditors have been guilty of such laches in permitting the mismanagement of this estate in several particulars as to bar them from now having their claims satisfied out of the real estate in question.

The mismanagement complained of relates to several matters. The first one argued is that the widow was provided for in the will and therefore must take under the will or **renounce** the will and take under the statute, but that she could not take both under the will and under the statute.

The Circuit Court having before it in the foreclosure proceeding the parties and the subject matter, determined that notwithstanding the will and the trust deed, the widow was entitled to a homestead of \$1000,

in value and proceeded to set the same off to her, and there is nothing in the record from which it can be determined that that finding and decree was procured or influenced by fraud. The County Court in the petition of the executor to sell the twenty-six acre tract to pay debts determined that the widow, notwithstanding-

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ing the will, was entitled to dower in the land not sold under the foreclosure decree, and proceeded to set off her dower. These courts had jurisdiction and the orders stand unreversed and unchallenged, except in this collateral proceeding. They cannot be challenged in this proceeding by appellants who were parties to both suits in which the orders referred to were entered. **Dempster v. Lansingh**, 244 Ill. 402 and cases therein cited. **Chicago Title & Trust Co. v. Moody**, 233 Ill. 634; **Pratt v. Griffin**, 233 Ill. 349. Besides that, appellants have not called our attention to how the widow was provided for by the will. Neither is it apparent from a scrutiny of the will itself just what, if anything, she was given by it that she was required to **renounce** before she could take under the statute. We see nothing in either of the orders referred to that we would feel justified in holding was either irregular or erroneous, if the question was before us for determination.

It is next contended that Ranson should have been required to have resorted to his security for his pay instead of filing his claim against the estate. It is proper for the holder of a secured claim to present the same for allowance in the probate court where the estate is being administered, or he may resort to his security, or he may pursue both methods. **Furnace, et al, v. Union Natl. Bank**, 147 Ill. 570.

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It is next urged that the claims were not paid promptly, and that consequently unnecessary interest was allowed to accrue thereon. There is nothing in the record to indicate that any interest was paid on any of the preferred claims. There was no unreasonable delay in fixing the claim day. The deceased died in February, 1880, letters testamentary were issued to the executor in March, 1880, and the May term, 1880, was fixed for claim day. At that time the law prohibited settling the estate in less than two years after letters testamentary were issued. During all that time claims might under proper circumstances be presented and allowed, and claims were in fact allowed against this estate in substantial amounts as late as March 1882. The Ranson claim for \$3799.99 was allowed on March 3, 1882, as shown by the report of the executor. The executor could not safely pay the seventh class claims or any dividend on them until the time had expired within which such claims could be allowed, particularly where the personal estate of the deceased is known to be insufficient to pay all of the known claims. In July after the expiration of the time in which claims might be presented the executor reported the amount of money in his hands available for the payment of

seventh

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class claims together with a list of such claims allowed and obtained an order allowing him to apply such funds pro-rata to the liquidation of such claims. About ten months later; viz., May 28th, 1883, the executor filed a second report showing the balance due on the seventh class claims and interest from July 10, 1882, the date of the first report on the balance of such claims not covered by the dividend there ordered paid. There is nothing in this record to indicate any undue delay in the application of the funds of the estate to the payment of the claims.

It is next argued with some show of feeling that the county judge of Morgan County was interested as an attorney for the estate and received fees from the executor. There is, however, no showing that the fees so received by the firm of which he was then a member were exorbitant, or more than others would have charged for the same service, and it appears from the record that a judge from another county entered most if not all of the orders complained of. We are not called upon here to determine the question of ethics involved in a county judge taking fees as an attorney in an estate being administered in his court. The question before us is whether the estate suffered by reason of the course pursued, to such an extent that the creditors are now estopped by laches from having the property now for the first time available for the payment of their claims, so applied. We are unable to find proof in this record that would warrant such a holding.

It is next insisted that the property set off to the widow as

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her homestead was, when the same was allotted to her, worth much more than the \$1000 which the law provides for; that the same has increased in value since, and that there should have been a reappointment of it obtained by the creditors and the surplus applied to the payment of the claims. The Supreme Court of this State have answered this last contention in **Garwood v. Garwood**, 244 Ill. 580, and in **Atherton v. Hughes**, 249 Ill. 217. In the Garwood case the Court said:

“* * * If a new allotment would be justified upon an increase of value, because the party entitled to a homestead has got all the law allows him, if he has a homestead of the value of \$1,000.00. it is equally clear that he has not got all the law allows him if the premises decrease in value below \$1,000.00. The estate of homestead, however, is not now a mere exemption, but is an estate in the land, and when its boundaries have once been fixed, a rule which would permit it to be cut down on account of subsequent enhancement in value, or to be added to in case of depreciation, would be impracticable and lead to much embarrassment. * * *”

Of course it goes without saying that if by fraudulent means an award of homestead grossly in excess of \$1000 in value should be obtained, the power of the courts is ample to correct the wrong, but no such condition is shown in this case.

The contention next made that the homestead was abandoned years

before the death of the widow is unsupported by the evidence. While she did not actually reside on the premises during the last several years of her life, she controlled it, rented it and had the proceeds

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from it, and clearly never abandoned it.

What has already been said disposes of the contention that the nine acres set off to the widow as her dower could have been sold before her death to pay the debts of the estate.

It is lastly insisted that the court erred in admitting certain evidence offered by appellee tending to show that Wood, the executor, had in fact paid the dividend which the court ordered him to pay at the time his last report was approved. If it was error to admit this evidence, it was harmless. It was not an issue in the case whether that dividend was in fact fair or not, for the petition before us asks for the sale of this property to pay the balance of the claims not included in the dividends which Wood should have paid whether he did pay them or not. So far as this case is concerned those dividends are treated as paid as directed by the court, and the presumption of law is that they were so paid in the absence of proof to the contrary. **Luther v. Crawford**, 116 Ill. App. 351-355 and cases there cited.

In 1883 the County Court held in effect that these very lands were exempt from sale to pay the debts of the estate until the death of the widow, and excused the representative of that estate from doing anything further until that event should occur. That order is sufficient to prevent creditors who relied and acted thereon from being held guilty of laches in not proceeding before the death of the widow

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to subject the land in question to the payment of their claims, and this proceeding was begun in apt time after her death.

Finding no error in this record, the order of the County Court is affirmed.

Order affirmed.

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GENERAL No. 6379.

APRIL TERM A. D. 1915.

AGENDA No. 33.

DANIEL B. STEWART, Appellee,

vs.

ILLINOIS CENTRAL RAILROAD COM-
PANY, Appellant.

Appeal from

McLear

Circuit Court

GRAVES, J.

This is an action begun by appellee to recover from appellant compensation for property destroyed by fire which he claims was started by sparks thrown from a passing engine of appellant. The case has been tried twice. The first time resulted in a judgment of \$5000. That judgment was reversed on appeal. The second trial resulted in a verdict and judgment against the appellant for \$8279. It is this last judgment appellant now seeks to have reversed.

Section 103 Chapter 114, Hurd's R. S. 1911 provides:

"That in all actions against any person or incorporated company for the recovery of damages on account of any injury to any property, whether real or personal, occasioned by fire communicated by any locomotive engine while upon or passing along any railroad in this state, the fact that such fire was so communicated shall be taken as full prima facie evidence to charge with negligence the corporation or person or persons who shall, at the time of such injury by fire, be in the use and occupation of such railroad. * * *"

We think the evidence in the record justified the jury in finding that the fire was started by sparks thrown from an engine of defendant, then in its possession and being used by it, which passed the place where the fire occurred shortly before the fire appeared. That made a **prima facie** case of negligence against appellant and as there was proof in the record of loss, the court properly denied appellant's motions to instruct the jury to find the defendant not

(Page 1)

guilty. When there is any evidence in the record, from which if it stood alone, the jury could, without acting unreasonably in the eye of the law, find that all the material averments in the declarations had been proven, the case should go to the jury. **Libby, McNeil & Libby vs. Cook** 222 Ill. 206.

When there is evidence in the record sufficient to make a **Prima facie** case under the statute above quoted, the burden of overcoming that **prima facie** case is on the defendant. **I. C. R. R. Co. vs. Barley** 222 Ill. 480, **C. & A. R. R. Co. v. Glenny** 175 Ill. 238. If he offers no evidence or not sufficient evidence to overcome such **prima facie** case, or if the plaintiff offers sufficient other evidence, so that on the whole record he has established his case by a preponderance of all the evidence, he is entitled to recover. When this case was submitted to the jury it was for them to

determine whether, considering all the evidence in the record, the greater weight of it supported the plaintiff's case. The jury found the issues for the plaintiff, and we think their verdict finds ample support in the evidence.

The third instruction given for appellee is criticised as likely to be understood by the jury to mean that appellant must disprove negligence by a preponderance of the evidence. It is not subject to the criticism made. If standing alone it might have been misunderstood, such possibility was removed when the Court gave the fourth instruction requested by appellant. That instruction was:

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["The Court instructs you that you should not find a verdict for the plaintiff upon speculation, possibilities, or mere probabilities; the law requires that before plaintiff is entitled to a verdict the evidence must show by a preponderance, First: That the fire was in fact caused by a spark or sparks emitted from defendant's locomotive in question.

Second; That the defendant was negligent either in the equipment, repair, or management of the locomotive, and that such negligence, if any, caused it to emit sparks, and, that the sparks so emitted started the fire which destroyed the property in question, and

Unless the plaintiff has proven each of these requirements by the preponderance of the evidence, your verdict should be for the defendant."]

The rule announced in **C. & N. W. Ry. Co. v. Chisholm** 79 Ill. 584, cited by appellant to show that appellee's first instruction was bad, in that it advised the jury that it was its duty to assess damages, if they believed certain facts to be established by the evidence, was held in **L. E. & St. L. R. R. Co. v. Haenni**, 146 Ill. 251-258 to apply only to cases where exemplary damages may be recovered. There was no question of exemplary damages in this case.

The objections to the action of the court in giving and refusing other instructions are hypercritical and without merit.

One witness was asked "what was the total fair cash value of all the property destroyed" and over objection answered "Nine Thousand four hundred and some dollars." The question was improper and the objection should have been sustained. It could, however, have done no harm. It was the last question put to the witness on direct examination and amounted to a request for the witness to add up the items already testified to by him. The answer was given in general terms.

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An examination of his previous testimony shows his answer to this question places the total value a trifle larger than the sum total of his previous estimates. The verdict of the jury was approximately \$1200 less than his estimate given in answer to the last question and \$900 less than his estimates given in answer to previous questions.

It is therefore apparent that the jury was not influenced to the detriment of appellant by the answer to the question objected to.

The judgment is for a substantial sum but not larger than in our judgment the evidence warranted.

The judgment of the Circuit Court is therefore affirmed.

Judgment Affirmed.

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GENERAL No. 6390

APRIL TERM 1915.

AGENDA No. 42

JACOB COHEN and
BENJAMIN COHEN,
Appellants,

vs.

H. H. DEVEREAUX and
CHICAGO-SPRINGFIELD COAL CO.
(a corporation)
Appellees.

Appeal from
Circuit Court
Morgan
County.

GRAVES, J.

A bill for an accounting was filed by appellants against appellees in the Circuit Court of Morgan County. The theory of the bill is that a partnership existed for a time in 1907 between the parties to this suit and that appellees had in their possession funds belonging to the firm for which they should account. The Master in Chancery to whom the cause was referred reported recommending that the bill be dismissed for want of equity. Upon hearing before the Court of Exceptions to the Master's report the Court found that a partnership existed and referred the case to the Master to state an account between the parties for the time they were so in partnership. From that order of reference this appeal is prosecuted.

The order itself is very indefinite, and gives the Master no basis from which he could state the account. Such an order of reference is not a final decree. **Gray v. Ames** 220 Ill. 251-254. **Lee v. Abrams** 12 Ill. 111. **Mahon v. Yanaway** 52 Ill. App. 23. For such an order an appeal will not lie. This appeal is therefore dismissed.

Appeal dismissed.

(Page 1)



OSCAR H. WYLIE, individually,
and as Trustee under the last
Will and Testament of SHERRILL
P. BUSHNELL, Deceased,

Appellant,

vs.

ALLEN S. BUSHNELL, CAROLINE
BUSHNELL, EMILY J. WYLIE,
SAMUEL M. WYLIE, WINIFRED
WHITE, HOWARD BUSHNELL, ETHEL
B. WARING, HORACE L. BUSHNELL,
EMILY BUSHNELL,

Appellees.

Appeal from
the Circuit Court
of Ford County
Illinois.

GRAVES, J.

Sherrill P. Bushnell died March 26th, 1902, leaving a widow, a son and daughter, a large amount of property both real and personal and some substantial debts. By his will he nominated appellant executor and conveyed to him his entire estate in trust for the carrying out of his will. On May 16th, 1911, appellant filed in the Circuit Court of Ford County his bill in chancery asking that a report of his acts and doings as such trustee, which he exhibited with his bill, be approved. On July 28th, 1911, Allen S. Bushnell filed his bill in chancery in the same court asking the removal of appellant as such trustee for reasons set forth in the bill. These two causes were later consolidated for hearing and determination. In January 1915 the Court entered its decree, in which it was first in general terms found that appellant had not faithfully performed his duty as trustee, ^{contained} followed by several special findings the substance of which is as follows:

comprehended (Page 1)

1. That appellant had never made an inventory of the funds that had come into his hands as trustee and had never filed in the County Court any proper inventory as executor from which the amount which should be charged to him as trustee can be ascertained:

2. That he had never kept any books of accounts as such trustee; that the only data kept by him of his receipts and disbursements as such trustee consisted of letters, statements, receipts and other memoranda kept in envelopes, some of which were originals and some duplicates, from which no reliable statement could be made showing the true condition of his accounts as such trustee:

3. That a number of reports filed by him in the County Court in the belief that they were correct differed so widely from each other and from the report filed with his bill as to indicate his inability to state a correct account.

4. That by lack of due diligence a debt of \$240 due the estate from a tenant at the time of the death of the testator was lost:

5. That he released without authority or the consent of the resid-

uary legatees a mortgage and the indebtedness secured thereby due the estate from Allen S. Bushnell and Caroline Bushnell to the amount of \$1250.

6. That he has never had an appraisement of the personal estate of the testator or paid all the debts of the estate or settled the estate in the County Court, although eight years have passed since the death of the testator, although to do so was necessary in order to determine the amount with which he should charge himself as trustee.

7. That he has never made any detailed statement in writing to the certui-que-trustents of the amounts of his receipts or disbursements as trustee, but has reported to them such facts only verbally and in a general way.

~~(Page 2)~~

8. That the report submitted with his bill is not a proper or sufficient report.

9. That by reason of his failure to discharge his duties as executor and trustee, ill feeling exists between him and some of the certui-que-trustents:

10. That he has taken credit for \$2117.38 for his services as trustee and that one-half of that amount or \$1058.69 is adequate:

11. That he should be removed as such trustee and a suitable person appointed in his stead.

The Court by its decree then orders that ^{ad complainant} ~~appellant~~ charge himself with the \$240 he so negligently failed to collect and with the \$1058.69 with which he has overcharged the fund for his own compensation; that the said Allen S. and Caroline Bushnell pay into Court for the benefit of the trust fund the \$1250 which was improperly released to them by ~~appellant~~ ^{complainant} together with accrued interest thereon: that ~~appellant~~ ^{complainant} as executor promptly close up the estate in the County Court and then file in the Circuit Court a true inventory of all the property both real and personal. in his hands as trustee and report showing in detail clearly every item of money that has come into his hands as such trustee and every item of expenditure of the same with the date when the person to whom and the purpose for which the same was paid up to January 1, 1910, and a second report of the same kind not later than April 1, 1915, covering the time from January 1st, 1910 to the date of such second report: that upon such inventory and re-

(Page 3)

ports being approved another trustee will be appointed to whom appellant shall turn over and transfer all the funds and property in his hands as trustee and that he shall then be relieved from the further execution of the trust; that ^{complainant} ~~appellant's~~ bill be dismissed for want of equity and that he personally pay the costs of the litigation. It is to challenge the correctness of this decree that this appeal is prosecuted.

We think the findings and conclusions contained in the decree are amply supported by the evidence in the record and that the orders there-

in contained are fully warranted by the law and the facts.

Appellant has placed great stress in his argument upon the fact that there is no evidence in the record warranting a finding that appellant has been dishonest in his management of the trust fund. There is no such finding in the decree. Neither is such a finding necessary as a basis for decree. It is quite as essential that a trustee shall be careful, diligent and prompt in the doing of everything required of him by the law and the will in which he is named as trustee, as it is to be honest. **Reardon v. Youngquist** 189 Ill. App. 3, 17. It is also his duty to keep accurate books of account in which are recorded from day to day as the transactions occur the items of moneys received and expended. It was for the neglect of these duties that the Court ordered him discharged as trustee. The Court did not find that his account filed with his

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bill was incorrect, except in respect to the item of \$240 lost by his negligence, the item of \$1250 for the note improperly cancelled, and the overcharge for commissions, but did find that it was impossible for one not personally conversant with the facts to tell from a lot of loose papers, letters, receipts and memoranda whether the same was correct or not, particularly in view of the fact that numerous discrepancies were discovered in different reports he had made of the same transaction.

Regardless of whether Allen S. Bushnell and certain other legatees may have consented that appellant might cancel the debt of Caroline and Allen S. Bushnell for \$1250, such cancellation was in fraud of the rights of the residuary legatees and the Court was bound so to hold.

The reduction of appellant's compensation was a matter lodged in the discretion of the trial court, and we think that discretion was not abused. He might well have been denied all compensation. It is for careful, diligent and prompt as well as honest service that one acting for others is entitled to compensation. **Reardon v. Youngquist** 189 Ill. App. 3-17 and cases there cited.

The decree of the Circuit Court is affirmed.

Decree affirmed.

(Page 5)

ANTONE NAGALIL, Appellee,

vs.

SHOAL CREEK COAL COMPANY,

Appellant.

Appeal from the
Circuit Court
of Montgomery
County
Illinois.

GRAVES, J.

In February 1912 appellee was a miner in the employ of appellant. *appellant*

At the time in question he was acting as a helper to a timberman whose duty it was to place timbers in the mines to support the roof where necessary. At a certain place in the mine some workmen discovered what they considered a dangerous place in the roof and reported it to the mine boss. When *appellee* next went into the mine, the night boss directed him and the timberman with whom he was working to go to the place in question and "timber" it. They went to the place directed. Before they began to work they looked for but found no examiner's mark to indicate a dangerous condition. They then pulled down some loose rock and prepared to timber the roof. While they were there working some loose rock and slate fell upon appellee, and he was painfully injured. His hip was dislocated, his head, shoulder, side and knee were bruised, and he was injured internally. He was laid up for three months. Three years later, at the time of the trial, he was still suffering from his injuries.] He brought suit charging appellant with willful failure

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to comply with the provisions of paragraphs 3, 4 and 5 of section 20 and paragraphs 1, 4, 5, 6, 7 and 8 of section 21 of the Miners Act, which among other things requires that mines shall be examined by a certified mine examiner within twelve hours preceding every day the mine is to be operated; to inspect all places where men are required to work and observe whether there is any dangerous roof, and where such dangerous roof is found to place a conspicuous mark or sign at such dangerous place as a warning, and to keep a record thereof in a book kept for that purpose, for the information of the company, the inspector and all persons interested. He obtained a verdict for \$750, filed a remittitur of \$250 and took judgment for \$500.

It is urged by appellant that the provisions of the act referred to applies only to miners proper, and not to timbermen. The Supreme Court in **Wilson v. Danville Coal Co.** 264 Ill. 143 and in **Pazzi v. Kernes Donnewald Coal Co.** 226 Ill. 30 have held that such act does apply to timbermen.

It is next urged that there is no proof that this act was violated. Appellee testified that he looked for the examiner's mark first and found none. Appellee did not see fit to prove that the act referred to had

been complied with or that any danger mark had been placed as required by that act. In the absence of affirmative proof that the mine had been examined and the danger mark placed as

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required by the statute, proof that appellee looked for it and did not find it is sufficient to warrant a finding by the jury that it was not there. Whether the failure of the mine examiner to place a danger mark near the defective roof was the proximate cause of the injury was under the facts in this case clearly a question for the jury. The peremptory instruction asked for by appellant was properly refused. **Libby, McNeil & Libby v. Cook** 222 Ill. 206.

It is next urged that the judgment is excessive. Larger judgments have been sustained where the injury was apparently no more severe than this one. We do not regard the amount excessive. He was earning nearly \$3.00 per day, which, for the time he was laid off would amount to about half the judgment he obtained. Besides that the evidence shows he suffered and still suffers considerable physical pain, which is a proper element of damage.

Two of appellee's given instructions are complained of, one of them because it tells the jury that the provisions of the Miners Act above referred to applies to timbermen as well as other employees. This instruction is correct in the authority of **Wilson v. Danville Coal Co.** and **Pazzi v. Kernes Donnewald Coal Co. Supra.** The other is criticised because it authorizes the jury to award damages for physical pain and suffering. That instruction also correctly states the law.

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Appellant complains of the refusal by the Court to give several instructions asked by it. One was bad because it included the element of contributory negligence. Contributory negligence is no defense where the charge is willful violation of the mining act. **Peibles v. O'Gara Coal Co.** 239 Ill. 373. **Mertens v. Southern Coal & Mining Co.** 235 Ill. 340. **Kelleyville Coal Co. v. Strine** 217 Ill. 523.

Another refused instruction announced the law to be that although the mine examiner failed to perform the duties imposed upon him by law, yet if he was not conscious of such failure, no liability would attach to the mine owner. The proposition is too preposterous to need comment. Everyone is presumed to know the law, particularly one who is specially designated to see that it is carried out. How anyone can know that the law requires of him an affirmative act and yet not be conscious of the fact that he has not performed such affirmative act is inconceivable, and it is still more incomprehensible how, if it were possible for a mine examiner to fail to examine a mine and not know it, that such fact should excuse the mine owner from the consequences of the failure to perform such duty.

The other refused instructions were all based on the theory that

the mine examiner had faithfully examined the mine. There was no proof offered by appellant even attempting to show that any examination

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whatever was made by such examiner. There was no error in refusing the instructions referred to.

Finding no error in the record, the judgment of the Circuit Court is affirmed.

Judgment affirmed.

The abstract of record prepared by appellant was insufficient and defective. Appellee very properly prepared and filed an additional abstract containing nine pages, the cost of which is ordered taxed to appellant.

(Page 5)

FRANK WALKER, Administrator of the
Estate of ANNA A. WALKER, Deceased.
Appellee,

vs.

E. C. SCHERTZ, Appellant, Et. Als.

Error to

Tazewell County.

GRAVES, J.

Appellee was during the lifetime of Anna A. Walker, her conservator, and upon her death he became the administrator of her estate.

As such conservator and later as such administrator, he held a note signed by appellant, dated March 5, 1907, for \$500 due in six months after date and drawing 7 per cent annual interest. There were two payments made on this note prior to the death of Anna A. Walker, that are endorsed thereon. One for \$200 dated August 14, 1908, and one for \$200 dated September 2nd, 1909, and appellant claims that he paid appellee \$75 on October 6, 1909 that should have been endorsed thereon but was not.

After the death of Anna A. Walker, appellant filed against her estate a claim consisting of eleven items, including the two, \$200 payments that were endorsed on the note and the \$75 payment he claims to have made on October 6, 1909. The first item of the claim was dated in March 1902, and the last in October 1909. This claim was objected to by the administrator and upon a hearing by the Court it

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was disallowed. After this claim was disallowed, but while the parties were still in the courthouse where the hearing was had, the parties agreed that appellee should give appellant credit on the note for the \$75 in controversy and that appellant should within twenty days, afterwards extended to thirty days, pay the balance due on the note. Within the thirty days mentioned, appellant sent appellee a check for \$129.32 enclosed in a letter which plainly informed appellee that according to appellant's understanding, the check for \$129.32 was in full for the balance due on the note. Appellee accepted this check, cashed it, and endorsed the amount of it on the back of the note as so much paid. Later his attorney wrote to appellant that there was still due \$2.02 on the note, and that if he did not pay that amount he would be sued, and that if he was sued the \$75 would not be allowed. He did not pay it, and appellee began this suit, before a justice of the peace where appellant was defeated. He then appealed the case to the Circuit Court of Tazewell County, where it was tried de-novo, before the judge without a jury. Appellee there obtained a judgment against appellant for \$105.32. It is the correctness of this judgment that is before us on this appeal.

The controversy in the Circuit Court, as well as here, is not

over whether the contract of settlement above mentioned was made, but
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whether the amount sent by appellant to appellee was a payment in full of the balance due on the note after the \$75 had been duly credited thereon.

There is no doubt that an accurate computation of interest and partial payments will show that the check was about \$3.00 less than the actual amount due on the note after the \$75 was indorsed thereon. Neither is there any doubt that appellant sent the check as a payment in full of the balance due on the note and as a compliance with the terms of the compromise agreement between himself and appellee. The letter sent by appellant with the check makes this clear.

If for any reason appellee did not wish to accept the amount for the purpose and upon the conditions named therein or in the letter accompanying it, it was his duty to return it to appellant. **Lapp v. Smith** 183 Ill. 179. The fact that he accepted the check, cashed it and kept the money must be construed as an acceptance for the purpose for which he knew it was sent, even if at the time he protested, that it was not for a sufficient amount. **Canton Coal Co. v. Parlin Etc. Co.** 215 Ill. 244, **Snow v. Greisheimer** 220 Ill. 106. The sending of the check by appellant to appellee as a payment in full of the balance due on the note and the acceptance by appellee of such check amounts under the facts in this case to an accord and satisfaction. **Bingham**

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v. Browning 197 Ill. 122., **Canton Coal Co. v. Parlin Etc. Co.** 215 Ill. 241.

The contention that the compromise contract was not valid because the administrator had not obtained authority from the probate Court to do so, is without force. The power to compromise claims was a common law power of an administrator. The provision of the statute making such compromise binding on all persons interested, provided a certain course is pursued, is intended for the protection of the administrator. **Hencley v. City of Chicago** 41 Ill. 136, **Short v. Johnson** 25 Ill. 405, **C. B. & Q. R. R. Co. v. Hendricks** 125 Ill. App. 480-489, **McFadden v. St. Paul Coal Co.** 263 Ill. 441-445.

The judgment of the Circuit Court is therefore reversed with a finding of fact to be incorporated in the record.

Reversed with a finding of fact.

We find as an ultimate fact that the check for \$129.32 was sent by appellant to appellee and accepted by him as an accord and satisfaction of all claims appellee had against appellant on the note sued on.

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GENERAL No. 6437. OCTOBER TERM A. D. 1915. AGENDA No. 15.

JACOB LONGENBACH and
ISAAC W. LONGENBACH,
Administrators Estate of Issac Longen-
bach, deceased,

Appellants,

Appeal from the
Circuit Court of
Shelby County.

vs.

STEPHEN G. COLE and
LYDIA J. COLE,

Appellees.

GRAVES, J.

Appellants as administrators of the estate of Isaac W. Longenbach on May 14th, 1913, filed their bill to foreclose a mortgage given by appellees. The mortgage was dated August 21, 1893, and was recorded in 1904. It was given to secure a note for \$250.00 dated August 2nd, 1893, and due September 1st, 1896. Several payments were endorsed on the back of the note. The last one was dated September 7th, 1901 and shows a payment of \$25. On the face of the note action on it was plainly barred by the statute of limitations and there was nothing in the endorsements on it that took it out of the operation of that statute. Under such a state of facts, when that statute is relied on as a defense, the bill must either by original averment or by amendment show some fact that prevents the running of that statute. **Walker v. Ray**, 111 Ill. 315.

To take the case out of the statute of limitations it is alleged in the bill that the deceased died February 13, 1912, and that for eleven years prior to his decease he was insane and incapable

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of transacting business.

The answer of appellees sets up the statute of limitations, denies that the deceased was insane or incapable of transacting business, and avers that he did in fact transact his own business for all of the eleven years next preceding his death. A general replication was filed to this answer and the cause was heard by the chancellor on proofs taken and reported by the master without his conclusions. The court found that the complainants had failed to establish the averments of the bill, and it was dismissed for want of equity.

The only contested issue presented by the pleadings was whether the mental condition of the deceased was such as to prevent the running of the statute of limitations. Upon that issue the evidence was conflicting. After a careful review of it, we feel that the finding of the chancellor was supported by the competent evidence.

There is in the record considerable testimony which appellants claim shows payments on the debt that are not credited on the back of the note. They now ask that the decree be reversed and the cause remanded to the Circuit Court with directions to allow them to amend their bill to

conform to the proofs. In support of that practice they cite **Higgins v. Higgins**, 219, Ill. 146. That case is not in point. In that case the trial court granted relief on grounds that were not averred in the bill, but of which there was sufficient proof that

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would have been competent if there had been proper averments. The decree was therefore reversed and the cause was remanded to the trial court with directions to permit an amendment to the bill to correspond with the proof and then to re-enter the former decree. In this case the decree was based on competent evidence and is clearly right under both the averments and the proof. The testimony which appellants urge shows payments on the debt that should have been endorsed on the note consists chiefly of conversations with and statements of appellant, of so indefinite a character, both as to amounts and dates, as to be worthless as evidence, and is wholly insufficient to support a finding that any payments were made within the period of limitations.

Appellants's contention in their reply brief that, because the question of the incompetency of the evidence of subsequent payments was not raised in the Circuit Court, it cannot be raised here, has no force. It is not raised here to reverse the decree but to support it. Appellants have no competent evidence in the record to show that such payments were made, even if the bill had contained averments that would make evidence of such payments competent.

The decree of the Circuit Court is therefore affirmed.

Decree affirmed.

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GENERAL No. 6442. OCTOBER TERM, A. D. 1915. AGENDA No. 18.

JOHN LINDENBAUM, Appellee.
Appellee.
vs.
THE SELLS-FLOTO SHOWS COMPANY,
Appellant.

Appeal from the
Circuit Court of
Vermilion
County

GRAVES, J.

This is an appeal from a judgment for \$1500 in favor of appellee in a suit for personal injuries.

[The declaration charges that appellee was at the time he was injured an employee of ^{div. servant} appellant as a performer in a circus; that one of his duties was to ride in street parades on an artillery wagon drawn by horses; that he had nothing to do with the management of the horses; that the management and control of the horses was in charge of other servants of ^{div. servant} appellant; that it was the duty of ^{div. servant} appellant to furnish appellee with a safe place to ride and a safe conveyance to ride on and to so manage the same as not to injure appellee. The only negligence charged is that ^{div. servant} appellant by its servants so negligently, carelessly and improperly drove and managed the horses attached to the artillery wagon on which ^{div. servant} appellee was riding that the horses ran away, the wagon was thrown against a pole and ^{div. servant} appellee, while in the exercise of due care for his own safety, was thrown from the wagon and injured.] To this declaration a plea of the general issue was filed.

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When sit is begun by a servant against his master to recover for personal injuries resulting from negligence, and the negligence charged is that of another servant of the same master, the declaration must either expressly aver that such two servants of a common master were not fellow-servants or must aver facts which negative that relation. **Chicago City Ry. Co. v. Leach**, 208 Ill. 198. The only averment in this declaration that tends to negative the existence of the relation of fellow servants is that appellee had nothing to do with the management of the horses attached to the wagon. To our minds that averment does not sufficiently show that the relation between appellee and the servant of appellant who had the management of the horses in charge, was not that of fellow-servants or in other words, that it was not such as to permit of the exercise of influence by one over the other promotive of caution. **Aldrich v. I. C. R. Co.**, 241 Ill. 402. If this case is ever tried again the declaration should be so amended as to clearly negative the relation of fellow-servant between appellee and the driver of the team.

The proof tended to show that the servant of appellant who was engaged in managing one of the teams hitched to the wagon in question,

and who in so doing rode one of the horses and guided the other with a single line, struck the horse he was riding with his spur and kicked the other horse and that thereupon the team became unmanageable and

(Page 2)

ran away. There is also some proof tending to show that but for the fact that a bystander ran in front of the team and waved some object in their faces thereby causing them to swerve in their course, the accident might not have occurred. It is the province of the jury to determine whether the negligence charged in the declaration or something else was the proximate cause of the injury. There is also some proof tending to show that one of the horses had a vicious propensity to "buck". There is no allegation in the declaration charging appellant with negligence in furnishing a horse with a vicious propensity, or with the failure to use due care in the employment of careful servants.

Under the facts in his case it was all important that the jury should have been accurately instructed. In that respect the court committed error. Notwithstanding the fact that the question of fellow-servant was clearly in the case, and the further fact that appellant claims that the question of assumed risk is also involved, the court gave at least two instructions at the instance of appellant, the same being numbered three and six respectively, in which a verdict is directed, yet in which the questions of fellow-servant and assumed risk are ignored.

The instruction numbered three undertakes to recite the averments of the declaration and concludes "if you believe from a preponderance of the evidence in the case that the plaintiff has proven the

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facts as alleged in said declaration, then under the law your verdict should be in favor of the plaintiff." The instruction numbered six is as follows:

"The court instructs the jury that the plaintiff is only required to prove his case by a preponderance of the evidence. He is not required to prove his case by any greater or higher degree of proof than a mere preponderance, and if you believe that the plaintiff has proven his case, as alleged in his declaration, by a preponderance of the evidence, then under the law it is your duty to render a verdict in favor of the plaintiff."

As there is no allegation in the declaration denying that appellee assumed the risk and no sufficient allegation there negating the relation of fellow-servant, it was error to give these instructions. **Ill Terra Cotta Lumber Co. v. Hawley**, 214 Ill. 243. When an instruction directs a verdict upon proof of certain facts, it must omit no element necessary to recovery. **Pardridge v. Cutter**, 168 Ill. 504.

In another instruction the court told the jury "you are not bound by the number of witnesses which may testify on one side or the other of any particular fact or state of facts." It is true that the preponderance of evidence as to any controverted fact is not necessarily determined by the number of witnesses who testify pro and con on that question, but other considerations being equal, that may be, and in fact often is,

the thing that controls. The instruction should not have been given in that form.

The judgment of the Circuit Court is reversed, and the cause is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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1973
GENERAL No. 6445. OCTOBER TERM A. D. 1915. AGENDA No. 21.

EPHRAM VAUGHN,

Plaintiff,
Appellee,

vs.

ILLINOIS CENTRAL RAILROAD
COMPANY,

(a Corporation)

Defendant,
Appellants.

Appeal from the
Circuit Court of
Moultrie County.

GRAVES, J.

This is an appeal from a judgement for \$1800 in favor of appellee for personal injuries.

Briefly, the evidence tends to show that in February 1914, appellee was one of an extra gang of laborers employed by appellant to remove snow from its tracks; that while appellant was conveying appellee and his co-laborers in the caboose of a freight train to a point where they were to work, it had occasion to switch out a car from the train; that in doing so the caboose was separated from the train some two hundred yards; that in again coupling the caboose to the train it was "kicked" against the train with such force as to cause it to strike against the train with enough violence to throw some, if not all, of the laborers down; that appellee claims to have received injuries at that time; that later the claim agent of appellant paid appellee \$40, which appellant claims was in full for his injuries, while appellee claims it was only for lost time.

While there is no dispute that appellee received from appellant

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\$40, the whole series of instructions given at the instance of appellee authorized the jury to return a verdict for all injuries and loss of time, and wholly failed to advise them that they were authorized to credit appellant with the \$40 it had paid appellee. While it was not necessary that appellee should return the money before beginning his case, appellant was entitled to credit for such money against any amount the jury should find appellee had been damaged.

The second of the instructions given at the instance of appellee dealt with the effect of the receipt given for the \$40 and advised the jury that if they believed from the evidence that the claim agent when he paid the money and took the receipt, told appellee "that he was only settling for lost time between February 25th and April 14th, and that he had no authority to settle any other kind of a claim for damages or demand" * * * * * and "that it was simply a paper to show that he had got the forty (\$40.00) dollars and nothing more," then the paper would amount to no more than a receipt for \$40. We have been cited to no evidence and have been unable to find any in this record tending to show that the claim agent made any of the above quoted statements

referred to in that instruction, or any equivalent statements. An instruction not based on the evidence should not be given. **Lusk v. Thorp**, 189 Ill. 127. **Baldinwink v. Cahill** 187 Ill. 218.

The third instruction given for appellee was erroneous because it authorized the jury to assess the damages from their knowledge,

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observation and experience in the business affairs of life. A jury may assess damages for pain and suffering, which are not susceptible of exact measurement, by the rule laid down in this instruction, but appellee in this case has asked damages for loss of time and his inability to pursue his usual calling and occupation. Such damages are susceptible of exact measurement and proof, and it is error to charge the jury that they may be estimated from observation and experience. **Smith v. Chicago City Ry. Co.** 165 Ill. App. 190. **Lyman v. Chicago City Ry. Co.** 176 Ill. App. 27.

Appellant insists there should be a finding of fact based on the release offered in evidence and that the cause should not be remanded for another trial. The question of whether that release was obtained by fraud and circumvention is one for a jury under proper instructions. **Papka v. Hammond Co.** 192, Ill. 631. **Ill. Central R. R. Co. v. Welch** 52 Ill. 187. **Spring Valley Coal Co. v. Burgis** 213 Ill. 346. **Monohan v. St. Paul Coal Co.** 193, Ill. App. 308.

The judgement of the Circuit Court is reversed for errors in instructions and the cause is remanded to the Circuit Court for another trial.

Reversed and Remanded.

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NOKOMIS NATIONAL BANK, Appellee,

vs.

JOHN H. ELMERS, Et Al, Appellant.

Appeal from the
Circuit Court of
Christian County

GRAVES, J.

John Henry Elmers and Joseph Elmers, children and heirs of William Elmers, deceased, on April 1, 1914 filed in the Circuit Court of Christian County their bill for partition of the real estate of which their father died siezed. All of the heirs and devisees of the said William Elmers were made parties to that proceeding. In due time the real estate described in the bill was sold by the master in chancery, his report of sale was filed and approved and a distribution was ordered. After the bill was filed and before the rights of the respective parties was adjudicated, Benjamin Elmers deeded his share in the estate to his brothers John and Charles Elmers for the expressed consideration of \$609 and Joseph Elmers deeded his share to his brother Charles Elmers for the expressed consideration of \$1500. These transfers were in no way made to appear in the records of the partition proceedings, and the order of distribution directed the master to pay to Benjamin Elmers and Joseph Elmers \$1919.33 each, on the basis that they were still the owners of the shares in the estate which the deeds above referred to purported to convey. After the

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order of distribution, but before the proceeds of the premises had in fact been distributed, appellee brought suit against Benjamin Elmers and F. Wm. Elmers on a note dated December 18, 1912 for \$300 due on demand, drawing 7 per cent annual interest and signed by them, and also brought suit against Benjamin Elmers, F. Wm. Elmers, and Joseph Elmers on a note dated February 23, 1913, for \$375 due in six months after date, drawing 7 per cent annual interest and signed by them. In aid of these suits appellee procured an attachment and caused the same to be served on the master in chancery as garnishee, and thereupon, on December 23, 1914, by leave of court filed in the partition suit its intervening petition alleging among other things that the deed by which Benjamin Elmers conveyed his interest in the estate to John and Charles Elmers and the deed by which Joseph Elmers conveyed his interest in the estate to Charles Elmers were without consideration and were fraudulent and void as to the rights of appellee and asking that the court so hold and for an order directing the master in chancery to pay the amount found to be due on the notes described out of the distributive shares of Benjamin and Joseph Elmers. An answer to this intervening

petition and a replication thereto was filed. Before issue was joined on this petition an order was entered pursuant to a stipulation of the parties directing the master in chancery to retain in his hands \$600 of the distributive share of Benjamin Elmers and \$600 of the

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distributive share of Joseph Elmers until the final determination of the rights of the parties to the intervening petition, and in case it should be finally determined that the intervening petitioner was entitled to the relief prayed for, then said master in chancery should pay said notes in full out of the funds so retained and pay the balance to the said Benjamin and Joseph Elmers. Before a hearing on the issue made up on this intervening petition had been had, appellee obtained judgment against Benjamin Elmers and F. Wm. Elmers on the three hundred dollar note, for \$346.35 and costs and against Benjamin Elmers, F. Wm. Elmers and Joseph Elmers on the three hundred and seventy-five dollar note, for \$442.40 and costs. On July 21, 1915, after a hearing of the issues made upon the intervening petition, the court entered its decree, finding that said deeds were not made in good faith but were made in fraud of the rights and equities of appellee, the intervening petitioner, and are null and void as to such rights, and ordered that the judgments on the said notes be paid by the master in chancery out of the funds so retained from the distributive shares of Benjamin and Joseph Elmers and that the balance of such sums so retained be paid to the said Benjamin and Joseph Elmers. From that decree this appeal is prosecuted.

The abstract of the record in this case is not in compliance with the rules of this court. From it no intelligent idea of what the record contains or what issues were tried in the Circuit Court

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can be obtained. To illustrate, the first page of the abstract contains the words "Court order relative to report of sale by master in Chancery." On page two "orders of court relative to intervening petition of complainant Nokomis National Bank, and order of Court that \$1,200 of the share of Benjamin and Joseph Elmers be retained by the Master pending hearing on the intervening petition." On page three "Copy of note" and again "Copy of note and affidavit to petition." On page four "Agreement made between the parties relative to retaining \$1200.00 as security, pending litigation." On page twelve "copies of two such notes sued upon" again "Order of court relative to presentation of additional matter for certificate of evidence, the defendants having submitted certificate of evidence as shown thereon as a complete certificate, which was objected to by petitioner and a motion made to incorporate the additional matters, which motion was allowed and the defendants excepted." Again "Original bill in partition suit", again "Exhibit attached to said bill being the last will of William Elmers, deceased." Again "Amendment to said original bill", again "Testimony of John H. Elmers taken before the master in

Chancery in the original partition suit: The only part that we conceive to be material upon this hearing is as follows". Then follows certain parts of the testimony of John H. Elmers.

We submit that it is apparent that while these notations might serve as an index to where in the record the matters referred to can be found, they are in no sense an abstract or abridgement of that record. It is a rule that so far as we know is not departed from by the

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Courts of review in this state, that, [unless the party bringing ^a the cause up for review shall not only present a record containing all that is necessary for the court to know in order to intelligently pass upon the questions presented, but shall also file an abstract or abridgement of that record from which the errors complained of can be discovered, the judgment of the lower court will be affirmed **pro forma**.] [Another rule equally well established is that [courts of review will never go to the record to discover errors not shown by the abstract, but will inspect it to find reasons to affirm.]

The judgment of the Circuit Court is therefore affirmed for want of sufficient abstract.

Notwithstanding the insufficiency of the abstract, we have given careful consideration to the evidence contained in the record and are constrained to hold that it strongly tends to support the finding of the Circuit Court that the deeds in question by which Benjamin and Joseph sought to alienate their shares of the estate were fraudulent as against the rights of appellee.

[Findings of fact of a chancellor should not be set aside as against the weight of the evidence, unless they are clearly and palpably so.] 4

Nolan v. Zagar 266 Ill. 39-44.

Upon the whole record we think the decree is right on the merits.

Decree affirmed.

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GENERAL No. 6452. OCTOBER TERM A. D. 1915. AGENDA No. 27

ILLINOIS CENTRAL TRACTION COM-
PANY, Appellant.

vs.

MARIE HERMAN, Appellee.

Appeal from the
Circuit Court of
Sangamon
County
Illinois.

GRAVES, J.

About November 1, 1908, Charles F. Herman leased certain premises in Springfield to the Springfield Consolidated Railway Company for a term of eight years for an annual rental of \$540. On May 21st, 1908, the Springfield consolidated Railway Company assigned its rights under the lease to appellant, the Illinois Central Traction Company. That company occupied the leased premises until the lease expired. The original lessor died prior to 1908, and appellee became the owner of the premises. The assignment of the lease to appellant was with the consent of appellee, and appellant paid appellee the rent as it accrued. The premises were occupied by appellant with certain railway tracks, a small office, a freight platform, and a "pit" under one of the tracks used for making certain repairs on motors, all of which was placed there by the lessee. When the lease expired the tracks and other property of appellant were removed from the premises by it. The monthly rental was all paid. The controversy here arises over the construction of the following stipulations contained in the lease:

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["It is further a part of the conditions of this lease that during said term all ground, sidewalk and general taxes, also all paving, special assessments and taxes shall be paid by the party of the first part, and if the same shall not be paid before said property shall be advertised for sale to collect the same, the party of the second part shall have the right to make such payments and deduct the amount of such payments from the rent thereafter to be paid.

Provided that in case the assessed value of said ground is increased by reason of the erection of any improvements put thereon by the second party, then the second party is to pay its portion of the taxes in proportion as the said property is enhanced in value by reason of such improvements over the present assessed value."

In March 1909 appellant received from appellee the following letter:

"Springfield, Illinois, March 13, 1909.

Mr. A. C. Murray,

Dear Sir:—

The amount of the taxes apportioned as the I. C. T. C.'s share on the property leased on East Monroe Street is \$118.90.

Kindly send check to cover same at your earliest convenience and oblige,

Yours truly,

(Miss) Marie Herman."

In 1910, 1911 and 1912 similar letters were received. In each of the four years the amounts demanded by appellee of appellant for its

share of the taxes were promptly and without question paid. The amount of such taxes paid, the assessed value of the property without the improvements and with the improvements and of the improvements themselves, together with the rate of taxation, the total amount paid and the amount paid by appellant is shown by the following table:

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Year	Assessed Value of Improvements on Leased Premises	Assessed Value of Premises without Improvements	Total Assessed Value of Premises	Total Taxes Paid	Amount Demanded of Traction Company	Rate of Taxation
1908	\$100.00	\$2550.00	\$2650.00	\$211.19	\$118.90	7.98
1909	167.00	4250.00	4417.00	220.10	131.79	4.98
1910	167.00	4250.00	4417.00	232.81	139.92	5.27
1911	266.00	8338.00	8604.00	419.93	279.96	4.88
1912	261.00	8333.00	8604.00	456.95	.....	5.31

Appellant now contends that the clauses of the lease above quoted should be construed to require it to pay only that proportion of the total taxes representing the amount assessed against the improvements placed on the premises by the lessee, or in other words, that it should have paid for the year 1908—\$7.98, for the year 1909—\$8.32, for the year 1910—\$8.80, and for the year 1911—\$12.98; whereas it in fact paid for said years \$118.90, \$131.97, \$132.92 and \$279.96 respectively and that by so doing it overpaid its share of the taxes for those years by a total of \$632.67. To recover this amount of taxes claimed to have been overpaid, appellant brought this suit. At the close of the plaintiff's case there was a directed verdict for the defendant followed by a judgment against appellant in bar of its action and for costs.

Appellee insists that the clause of the lease above quoted should be construed to require appellant to pay, not only the taxes on the improvements placed on the premises by the lessee, but also on the increased valuation of the premises due to the presence of

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such improvements,

and that the parties have always so construed it.

It was this construction of the contract that the trial court adopted in directing a verdict.

It is not contended that any fraud or misrepresentation was practiced by appellee in demanding the several amounts paid by appellant. Neither can it be successfully contended that appellant paid the several amounts in ignorance of the facts. It was in possession of the premises all the time and certainly was informed as to what improvements it placed upon the premises and the costs of the same. The assessment from year to year was a matter of public record to which it had access and its attention was annually specifically called to the constantly increasing tax on these premises. These things appellant must be presumed to know, and there is no evidence in the record to which our attention has been called that it was not in fact familiar with the amount

of the assessments on the lands as well as upon the improvements placed thereon by it, and the rate of taxation. The contract expressly provides that in case the **"Assessed value of the ground"** is increased by reason of the erection of any improvements put thereon by the lessee, it "is to pay its portion of the taxes in proportion **as the property is enhanced in value** by reason of such improvements **over the present assessed value.**" There is no contention that the enhanced assessed valuation of the premises

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was due to any other cause than the improvement placed there by appellant. With all these things before them the parties themselves construed the contract to require appellant to pay all the additional taxes resulting from the enhanced assessed valuation of the property, and it did pay the same from year to year. While there is some doubt what an independent construction of this contract by the courts would be, we think the construction so placed upon it by the parties in its performance is a reasonable one, and we are not prepared to say it is not in accord with the intentions of the original makers of it. The Circuit Court in adopting that construction not only did no violence to the terms of the contract, but followed the well established precedents of the courts of this State.

Walker v. Ill. Cen. R. R. Co. 215 Ill. 610. See also **Alexander v. Barreti** 46 Ill 226, **McLean Coal Co. v. Bloomington** 234 Ill. 90.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

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THE ALEXANDER LUMBER CO.,

Appellant.

vs.

THE CHAMPAIGN BASE BALL CLUB, a
Corporation, W. H. MILLER and MINNIE
VOGEL, Appellees.

Appeal from the

Circuit Court of

Champaign

County

GRAVES, J.

On December 23, appellant filed its petition in the Circuit Court of Champaign County for a mechanic's lien on certain premises therein described. It is therein averred that appellees W. H. Miller and Minnie Vogel are, and at the time of the occurrences in question were the owners of the described property; that pursuant to a verbal contract entered into between appellant and appellee, the Champaign Baseball Club, in the month of April, 1912, appellant furnished lumber and materials from which appellee, the Baseball Club, with the "acquiescent knowledge and consent" of appellees and Miller and Vogel erected on the premises in question a grand-stand, bleachers, signboard and fences that constituted an improvement on the real estate; that there was due appellant and unpaid for the same the sum of \$1491.41, and prays for an order requiring all the appellants to pay that amount by a short day and in default thereof that the premises described be subjected to a lien for the materials in question and sold to pay the amount due, with costs. To this petition the baseball club filed its separate answer and admits the furnishing of

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the materials and the erection of the structures as alleged, but denies that it owes appellant anything whatever for the same, and avers that on April 10, 1913, it conveyed by bill of sale to appellant all of the structures erected from the materials so furnished in full and complete payment for all debts due appellant from the baseball club, which property so conveyed by said bill of sale was accepted by appellant in full settlement of all obligations due it by the baseball club, and released the said baseball club from all obligations to appellant, and became and considered itself to be the owner of such structures and thereupon leased the same to the said baseball club for a definite period of time for a stipulated rental. The bill of sale and lease referred to in the answer are attached to it as exhibits.

Appellees Miller and Vogel filed their joint and several answers to the petition and admit that they are the owners of the premises in question but deny that the structures in question constitute improvements on the premises and deny that they had any knowledge of the purchase of the materials or the building of the structures on the premises, and aver that of

information that the baseball club had conveyed the structure; to appellant in full settlement of all obligations to it and had since leased the same from it. Beyond these facts these appellees disclaim all knowledge of the facts averred in the petition. The cause was then referred to the master in chancery.

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who took the proofs offered by appellant. No proof being offered by appellees, the master reported his conclusions to be that appellant was entitled to the relief prayed for in its petition and recommended a decree accordingly. Exceptions to the master's report were sustained by the court, and a decree was thereupon entered in which the court found the equities to be with appellees; that the structures were not improvements to or part of the real estate; that the same were placed there without the knowledge or consent of appellees Miller and Vogel and that appellant accepted the bill of sale in question as, and that its acceptance was, a full settlement of all debts due appellants from the baseball club so far as relates to the matters involved in this litigation, and that there is nothing due appellant from any or either of appellees on account of the claims set out in its petition; that the structures were and always have been personal property and not real estate and were so treated by all the parties; that appellant was then the owner and entitled to the possession of the same, and thereupon dismissed the petition and ordered appellant to pay the costs.

Before appellant would ~~be~~ ^{be} entitled to have a lien declared on the premises, it must appear both by averment and proof, that the materials furnished were for the construction of something that was to become part of or be an improvement on the real estate as distinguished from such things as when completed still retain their character as personal property, and that the petitioner has an existing right to

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compensation therefor. Chapter 82 R. S. Sec. 1.

The proof in this case establishes that appellant furnished to the baseball club certain materials to the amount of \$1491.41, and that the same was used in the construction of a grand-stand, bleachers, signboards and fences, but we do not think it shows that it was ever intended by the parties that the same should lose its character as personal property or become part of the real estate or an improvement on the real estate as contemplated by the statute cited.

On the contrary it appears that after the materials in question were furnished and used, but long before the petition in this case was filed, the structures constructed from them were conveyed by the baseball club to appellant by bill of sale in which the same were described as "goods and chattels", and appellant leased the same back to the baseball club for a definite period at a definite rental and therein described the same as "personal property," and stipulated that at the termination of

the lease appellant should have the right to enter upon the premises and remove the leased personal property therefrom without process of law.

Clearly in the making of this bill of sale and lease the parties to those instruments were dealing with this property as personal property regardless of whether the bill of sale was what it purported to be or was given merely as security, and in making the stipulation that appellant might remove the same from the premises without process of

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law they were treating it as **appellant's** personal property. It is not here contended that anything has transpired since the making of this bill of sale and lease to change the character of the property therein dealt with from personal property to real estate. The owners of the real estate on which these structures were located do not, and never have, claimed them as part of or an improvement on the real estate. We think the conclusion that the trial court came to, that these structures were no part of or improvement on the real estate, but were personal property, is irresistible. That being true, appellant failed to establish its right to a lien and the petition was properly dismissed.

We think also that the finding of the trial court that the bill of sale was what it purported to be on its face, and that thereby appellant acquired title to the property therein mentioned, and was at the time the decree was entered the actual owner thereof, is also amply supported by the evidence. [A conveyance absolute on its face will not be construed to be a conditional one except on competent proof which clearly shows that the intention of the parties was that the same should be conditional.]

Whitmore v. Fisher 132 Ill. 243.

In the view we take of the case it is wholly immaterial to determine other questions argued. ●

For the reasons given the judgment of the Circuit Court is affirmed.

Judgment affirmed.

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GENERAL No. 6461. OCTOBER TERM, A. D. 1915. AGENDA No. 36.

HOMER W. HALL, Administrator of the Estate of Thomas J. Bunn, Deceased, Plaintiff in Error.

vs.

CORN BELT BANK, Defendant in Error.

Error to the
Circuit Court of
McLean County

GRAVES, J.

This record was brought here by writ of error sued out by Thomas J. Bunn. Since the cause was taken, the death of the said Thomas J. Bunn, has been suggested on the records of this court and Homer W. Hall as administrator of his estate has by leave of this court been substituted as plaintiff in error.

The suit the record of which is brought here for review by this writ of error is an action for personal injuries resulting from the fall of plaintiff in error's intestate down an elevator shaft a distance of some eight feet.

[The negligence charged in the declaration is that defendant in error by its servant suddenly and negligently started its elevator in its office building while plaintiff in error's intestate was in the act of entering it.

~~The jury found defendant "not guilty", and a judgment was entered against plaintiff in bar of his action and for costs.~~

There were three eye-witnesses to the accident; viz., Thomas J. Bunn, now deceased, ~~who was the plaintiff in error~~, the elevator

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man, and a young lady who was waiting to take the elevator. They all testified at the trial. The evidence tends strongly to show that when the deceased and the witness Miss Fenstermaker were standing on the main floor of the office building of defendant in error, the elevator man brought the elevator to that floor and in stopping did not succeed at first in bringing the floor of the elevator on a level with the floor of the building there; that he then called out to those there to wait a minute until he could bring the floor of the car to a level with the floor of the building; that when that was done, the deceased himself opened the door wide enough to permit him to enter the elevator, and attempted to do so; that as he did so he stumbled and the elevator man put out his hand to assist him; that in doing so his other arm came in contact with the controller of the elevator and the elevator went upwards about four feet when the operator stopped it, that the deceased fell partly on the elevator floor and partly off, and then down the elevator shaft to the bottom a distance of about eight feet, and was injured.]

The questions of the negligence of the elevator man, the contributory negligence of the deceased and of unavoidable accident were all involved

and were presented to the jury for their determination under proper instructions.

We are unable to see any evidence of negligence on the part of the operator of the elevator, or contributory negligence on the part

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of the deceased. A careful consideration of all the evidence convinces us that the injury to plaintiff in error's intestate was due to one of those unfortunate combinations of circumstances that are in law known as unavoidable accidents, for which no one is legally responsible. We cannot therefore set aside the verdict as contrary to the evidence.

Plaintiff in error has called our attention to fourteen different claimed errors in the rulings of the court on the admission and exclusion of evidence and in giving and refusing instructions. To discuss all these questions would extend this opinion to an unwarranted length. It is enough to say we have gone carefully over each of the points raised and have given due consideration to the argument of plaintiff in error thereon and find that the trial court committed no error in any of the matters complained of.

The judgment of the Circuit Court is therefore affirmed.

Judgment affirmed.

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GENERAL No. 6466. OCTOBER TERM A. D. 1915. AGENDA No. 39.

FANNIE MILLS,

Appellee.

vs.

CLIFFORD W. WARNER, Executor of the
Last Will and Testament of Jacob Gahm,
Deceased,

Appellant.

Appeal from the
Circuit Court of
Hancock County.

2011.4.250

GRAVES, J.

This is an appeal by the defendant from a judgment in favor of the plaintiff in an action on the case for malpractice.

Appellant is the executor of the last will of Jacob Gahm, deceased. Jacob Gahm was a physician. Appellee on February 19th, 1906 being about to be delivered of a child, employed Gahm to attend her. The child was born the next day. On July 11, 1913, nearly seven years and five months after the child was born, about six months after the death of Dr. Gahm, and about three and a half years after she admittedly knew all about her condition, appellee began this suit.

The declaration charges that Dr. Gahm at the time of the birth of the child, which is laid in the declaration as having taken place on January 1, 1909, by the unskillful and negligent use of instruments to assist in the delivery of the child, the bladder of appellee was punctured and infected and that the said Gahm because of lack of skill, failed to cure her of the malady so occasioned.

Appellant filed a plea of the general issue and a plea of the statute of limitations. Appellee joined issue on the first plea, and

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by leave of court replied double to the plea of the statute of limitations. First, that the action accrued within two years before suit was brought and second, that Gahm, knowing her condition and that he had caused it, fraudulently concealed the same from appellee and failed to properly treat her for the same, and thereby kept appellee in ignorance, and she did not know of her condition and the cause of it until January 1st, 1910, and that her action was begun within five years after she became aware of the truth.

The law in force at the time it is claimed the right of action accrued to appellee, barred the suit, unless it was begun within two years after the right of action accrued, unless such right of action was fraudulently concealed from appellee, in which case action might be begun within five years after she discovered she had such right.

Sec. 14, Chap. 83, Paragraph 7209, Jones & Addington's Statutes, and Sec. 22, Chap. 83, Paragraph 7217, Jones & Addington's Statutes.

Two issues of fact were tried by the jury. First, whether Dr. Gahm was guilty of malpractice, and second, whether he was guilty of fraudu-

lently concealing from appellee the fact that she had a cause of action so that she did not know of it until within five year next before she began suit.

Unless there was such fraudulent concealment, the action was clearly barred by the two year limitation cited. Even if Dr. Gahm was guilty of fraudulent practices for the purpose of concealing from

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appellee her cause of action, still the five year limitation would begin to run from the time appellant discovered from any source that she had a cause of action. Sec. 22 Chap. 83 already cited.

If Dr. Gahm was guilty of malpractice resulting in the injuries complained of, it occurred at the time appellee was delivered of the child in question, which the evidence conclusively shows was on February 20th, 1906 and not on January 1st, 1909, as alleged in the declaration, and consisted in the improper use of instruments to assist in the delivery of the child, by means of which the bladder of appellee was ruptured.

[The evidence introduced on the part of appellee to show what Dr. Gahm did at the time of the birth of the child and what the result was upon the appellee was given by Mrs. Sarah Kinkaid, the mother of appellee. Her testimony shows that instruments were used; that appellee was not given chloroform or other anesthetics; that after the child had been born the witness in the presence and hearing of appellee said to the doctor as he was about to depart, "There is something more you have got to do, you tore her literally all to pieces," that he said "she will be all right," to which Mrs. Kinkaid replied "she never will," and that appellee then said "I believe I'm flowing to death;" that this conversation related by Mrs. Kinkaid took place in the presence of appellee, who, as the witness expressed it "was right there on the bed, she heard every bit;" that within a few

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days after the birth of the child appellee and her mother became convinced that appellee's bladder was ruptured, and Mrs. Kinkaid suggested an experiment to determine whether their surmises were correct; that Dr. Gahm at Mrs. Kinkaid's suggestion injected water into the bladder, and it leaked out through the ruptured place and was caught in a receptacle held by Mrs. Kinkaid; that appellee knew why the experiment was made; that she knew what the test was and what the result of it was. From this testimony, if it is to be believed, appellee knew all about her own condition and the cause of it that Dr. Gahm knew and as soon as he knew it. If she had a cause of action against Dr. Gahm, she knew all there was to know about the facts connected with it as soon as it existed. There is nothing to show that Dr. Gahm knew anything that could be concealed from appellee that appellee did not know as soon as he did.

[The only testimony that it is claimed shows any attempt on the part

of the doctor at fraudulent concealment is in regard to two circumstances. One occurred the third day after the child was born. Mrs. Kinkaid had told the doctor that there was something wrong with appellee's bladder, and he without making any examination expressed the opinion that the neck of the bladder was paralyzed and prescribed some medicine for it. There is nothing in this record to show that the doctor then knew or had reason to believe the bladder was ruptured or that he attempted to hide any fact from appellee. The other circum-

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stance was on the train some three months after the child was born when Mrs. Kinkaid says the doctor offered her ten dollars not to say any more to appellee about her bladder being torn. An examination of the testimony regarding that incident as related by Mrs. Kinkaid discloses that the doctor believed that appellee was being made worse by having her condition discussed with her and in her presence by the witness and some women whom the doctor called "Old handkerchief heads," and said if it was not stopped she never would get any better and that he would not treat her any more if such conversation was not stopped. That Mrs. Kinkaid understood what the doctor meant is shown by her answer to him. She said "if you think that I am making her worse by telling her that, I won't say anything more to her about it." There is absolutely nothing in these circumstances to indicate an attempt to fraudulently conceal from appellee that she had a cause of action for malpractice.

We think the verdict of the jury in so far as it amounted to a finding that the doctor had been guilty of any fraudulent concealment from appellee of her cause of action is manifestly contrary to and wholly unwarranted by the evidence, and that there is no fact shown by this record that can be held to have excused appellee from failing to bring her suit within the two years after her right of action accrued. That being true, her action was barred by the statute of limitations.

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There is also considerable doubt whether appellee's condition was due to any act of negligence or want of skill of the doctor. There is, however, no occasion for us to determine that question.

For the reasons stated, the judgment of the Circuit Court is reversed with a finding of fact to be incorporated in the judgment of this court.

Judgment reversed with a finding of fact.

We find as an ultimate fact that the cause of action sued on did not accrue to appellee within two years before this suit was brought, and that Dr. Gahm was guilty of no fraudulent concealment from appellee of her cause of action.

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GENERAL No. 6469. OCTOBER TERM A. D. 1915. AGENDA No. 42.

HENRY WARNER, Et AL.,

Appellants,

vs.

SYLVESTER WAGNER, Et AL.,

Appellees.

Appeal from the
Circuit Court
of Shelby County,
June Term
A. D. 1915.

GRAVES, J.

This is an appeal from an interlocutory order of the Circuit Court of Shelby County dissolving a temporary injunction. The bill upon which the temporary injunction was ordered charges that appellees were school directors of School District No. 64, Township No. 12, North, Range 3, East of the Third Principal Meridian in Shelby County, Illinois; that they threaten to move the school-house in that district from its then present cite to another cite described in the bill and to erect on such new cite a new two room school-house and to issue bonds in the sum of \$4000 for such purpose; that the said directors claim to have derived authority to do so from the vote of the people at a pretended election held on May 4th 1915; that said election was irregular, illegal and void for several reasons set out in the bill. The complainants then pray for a temporary injunction, and on a hearing of the bill a permanent injunction, and for general relief.

Appellees answered the bill affirming the regularity of the election of May 4th, 1915 and claiming the right to move the school-house etc. pursuant to the result of that election. To this answer

(Page 1)

the appellants filed their replication. Thereupon appellee filed their motion to dissolve the temporary injunction supported by affidavits. This motion to dissolve was heard by the Court and on July 17th, 1915 was allowed and the temporary injunction was dissolved accordingly. On that same day an appeal from that order was prayed for and allowed. The appeal bond was filed August 24th, 1915 just thirty-eight days after the appeal was allowed.

On September 9th, 1915 there was filed in the office of the Clerk of the Circuit Court a so-called certificate of evidence signed by the trial judge but which on its face appears to be merely a transcript of the motion to dissolve the injunction, the notice to opposing party of the time when and place where the motion would be called up for hearing, the affidavits filed in support of the motion, together with certain exhibits attached to the motion, the verified bill of complaint and certain counter affidavits filed by complainants in opposition to the motion to dissolve the temporary injunction together with the interlocutory order of the court dissolving the temporary injunction and granting the appeal, and which

contains no evidence of any kind whatever taken in open court. The transcript of the record was not filed in this court until October 5th, 1915 which was seventy-eight days after the interlocutory order dissolving the temporary injunction and granting the appeal was entered in the Circuit Court.

(Page 2)

From an inspection of this record the fact is disclosed that there was no hearing or determination in the Circuit Court of the issues made by the bill and answer and no final order dismissing the bill entered. The only issue presented by or determined on this motion to dissolve the temporary injunction was whether the temporary injunction should remain in force until the cause was heard upon the merits. It further appears that whether or not there should be a permanent injunction can only be determined by a hearing on the merits of those issues. Those issues the parties have a right to have heard on the testimony of witnesses taken in open court, before the master or upon deposition, when the right of cross examination can be exercised. **Chicago P. & St. L. R. R. Co. v. National Switch and Signal Co.**; 79 Ill. App. 384. While it may be true that if the parties had seen fit to submit the merits of the issues made on the bill and answer to the determination of the Court upon the bill, answer and affidavits, and the court had dissolved the injunction and dismissed the bill an appeal could have been taken, (**Carroll v. Barry Bros. Transportation Co.** 118 Ill. App. 230,) yet in the case of **Clabby v. Sheldon** 47 Ill. App. 166 where a motion to dissolve a temporary injunction was heard on affidavits and an order entered dissolving the temporary injunction and dismissing the bill, the appeal was dismissed because the case had not been submitted to be heard on the merits. It is, however, clear that

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an interlocutory order dissolving a temporary injunction without an order dismissing the bill is not appealable, **C. P. & St. L. R. R. Co. v. The National Switch and Signal Co.** 79 Ill. App. 384.

The order entered in this case was not a final determination of the merits of the controversy and was not appealable.

Even if the order in question could be construed as an appealable interlocutory order under Section 123 of the practice act, it would still be necessary to dismiss the appeal because by that section such appeal must be taken within thirty days and must be perfected in the appellate court within sixty days from the entry of the order. The appeal bond was not filed within thirty days or the appeal perfected in this court within sixty days from the entry of the order appealed from as required by that section.

The appeal is therefore dismissed.

Appeal dismissed.

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2
GENERAL No. 6477. OCTOBER TERM, A. D. 1915. AGENDA No. 45.

MARY C. CREIGHTON,

Appellee,

vs.

ROBERT F. CREIGHTON, Et al,
Executors Etc.

Appellant

Appeal from
the Circuit Court
Vermilion
County.

GRAVES, J.

The controversy in this case arose in the probate court on the petition of the widow praying that her widow's award given by statute be set apart for her. The petition avers among other things that the petitioner had signed a release of her right to an award but that such release was obtained by fraud and misrepresentations and was therefore not binding on her. The executors filed their answer to that petition and averred that the widow for in consideration of \$100 in cash and certain personal property, which the evidence shows was worth approximately \$100 had released her statutory award, and that the same was valid and binding on her and was not obtained by fraud and misrepresentations. The county court found that the release was obtained by fraud and misrepresentations and was not binding on the widow, and ordered the executors to make the award to be made to her under the circumstances. The executors appealed to the Circuit Court where the case was again tried. The Circuit Court made substantially the same findings and entered substantially the same order. It is from this order of the Circuit Court that this appeal is prosecuted.

(Page 1)

Appellants ask a reversal of the order because the evidence fails to support the finding that the release was obtained by fraud and misrepresentations, and because the circuit court on appeal from the county court had no jurisdiction on the petition filed to try the question of whether the release was obtained by fraud and misrepresentations or not; that until the release was set aside by a court of equity it was binding on the widow.

[The probate courts of this state have jurisdiction to determine whether a petitioner is entitled to a widow's award even where in determining that question it is necessary to exercise equitable powers.] A

Field v. Field 117, Ill App. 307. Affirmed in 215 Ill. 496. See also **Trego v. Estate of Cunningham** 267 Ill. 367. [The hearing in the Circuit Court on appeal from the probate court is **de novo**.] B


The question whether the release was obtained by fraud and misrepresentations and was void for that reason is one of fact which both the probate and circuit court have determined affirmatively and while there was evidence both ways, we do not feel justified in setting the finding

and order of the circuit court aside, because contrary to the weight of the evidence.

Some other questions of minor importance have been argued, but we find nothing in them to warrant a reversal of the order of the Circuit Court.

The order of the Circuit Court is therefore affirmed.

Order affirmed.

The costs of this appeal are taxed to the Executors in their ~~personal~~  capacity.

MATTHEW KERBER,

Appellant

vs.

CLAUS STROH,

Appellee,

Appeal from
McLean County
Circuit Court.

GRAVES, J.

Appellant and appellee are farmers. Their farms are on opposite sides of the county line between McLean and Ford counties. Appellant has owned his lands since about 1879. Appellee purchased his lands in 1903 from one Frank Gilbert who owned the same since about 1879. The lands lying immediately south of appellant's lands are now and have been since about 1881, owned by one Brethorst. The line between appellant's and appellee's lands runs north and south. Appellee's lands are east of appellant's lands. The Brethorst lands are south of appellant's lands. In a state of nature there was on the southwest of appellee's lands, the southeast part of appellant's lands and the northern part of Brethorst's lands a low place where a pond of water stood much of the time. When the water in this pond overflowed it took a southwesterly course from appellee's lands across appellant's lands and from there to Mackinaw river distant about a half mile. In about 1889 a road was laid out north and south on the line between the lands of appellant and appellee and east and west along the line between the lands of appellant and Brethorst. About the time these roads were being opened appellant's grantor, appellee, Brethorst and the highway commissioners of the respective townships

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by mutual agreement dug a ditch along the north side of the east and west highway and the south line of appellant's lands from Mackinaw river to the point where the water flowed out of the pond when it overflowed. The next year Gilbert, appellant's grantor, extended the ditch about 35 rods further east into the pond. Appellee did not assist in digging this extension but has since helped to keep it clean. Somewhat later the road north and south between appellant's and appellee's lands was graded to some extent and a bridge that had been constructed to permit the flow of the water from appellee's land across the road was moved a short distance further north, and a ditch was dug on the west side of the north and south road, from the bridge south to the southeast corner of what is now appellant's land, thence west to the east end of the ditch that had been previously constructed. In these changes the three then owners of the land and the highway commissioners took part. The dirt excavated from the ditch between the bridge and the corner of appellant's land was placed in the highway. About that time a tile drain was constructed

across the road and across the lands now owned by appellant which emptied into the east and west ditch some distance west of the southeast corner of appellant's lands. Shortly after the bridge above mentioned had been moved appellee dug a ditch on his own land in an easterly and westerly direction ending at or near the bridge and so constructed as to empty

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into the ditch on the west side of the road there. Notwithstanding these ditches, when the water was high it overflowed the lands there and passed off over the lands of appellant in the same course it followed when the lands were in a state of nature. All this occurred at least twenty years before the bill in this case was filed. The foregoing facts are practically undisputed.

Appellee claims that appellant has at various times since he owned his farm constructed dams or dykes along the west side of the north and south road there which interferes with the natural flow of the water across appellant's lands and causes it to collect and remain upon appellee's lands to their damage as farm lands; that the dams so constructed by appellant have from time to time been washed away or destroyed and have been several times reconstructed; that the last time the same had been reconstructed was the day before the bill in this case was filed.

On May 4th, 1912 appellee filed his bill in the Circuit Court of McLean County praying for an injunction restraining appellant from maintaining such dam and from constructing any other dam there. Appellant answered the bill which in substance admits that the natural watercourse for the water passing out from the pond in question was across his lands, but avers that it has not done so in twenty years; that during that time it has flowed down the ditches above mentioned into Mackinaw river, avers the construction of the ditches and drains

(Page 3)

above mentioned by mutual agreement; that an embankment was thrown up at the time the ditches were constructed to prevent the water from passing over his lands; that these embankments have washed away and that he has repaired the same.

The master in chancery to whom the case was referred found and reported that no agreement had been proven to free the land of appellant from its burden as the servient heritage; that there is an embankment about 60 rods long extending both north and south of the bridge which tends to obstruct the natural flow of the water; that the embankment in question was not built when the ditch was dug or until about 1898 and that since that time it has been repeatedly destroyed by overflow as well as by appellee and that no prescriptive right to have it remain exists; that the equities were with appellee and that he was entitled to the injunction prayed for. Exceptions to the report of the master were overruled by the court and the decree recommended by the master, granting the injunction prayed for, was entered. This is the decree ap-

pealed from.

While there is considerable conflict in the evidence, we are not convinced that the findings of fact of the master and the court are contrary to the weight of the evidence.

Appellant's contention here is based almost exclusively on the theory that the embankment complained of had existed there for more

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than twenty years and that it was a part of the drainage system at that time constructed by mutual consent of appellant, appellee, Brethorst and the highway commissioners.

The complete answer to that contention is that the proof in this case fails to show that the embankment had existed there for twenty years. The fact that the ditches had existed for more than twenty years and that the owners of the respective pieces of land had acquired prescriptive rights to have what water those ditches would carry run through them, does not operate to divest the owner of the dominant heritage of his right to have so much of the surface water that comes naturally on his lands as those ditches will not carry off, pass over the servient heritage in the channel through which it passed in a state of nature. **The People v. C. & E. I. R. R. Co.**, 262 Ill. 492. **Broadwell Drainage District v. Lawrence**, 231 Ill. 36. The right of the owner of the servient heritage to have waters that have been diverted from the natural watercourse by the construction of a ditch, flow in that ditch does not extend to waters that have never been and cannot be confined within such ditches. Appellee in this case only asks that such waters as the ditches there constructed will not carry be allowed to flow over appellant's lands as in a state of nature. This he clearly is entitled to. **Gilman v. Madison County R. R. Co.** 49 Ill. 484. **C. P. & E. St. L. R. R. Co. v Renter** 223 Ill. 387

The decree of the Circuit Court is affirmed.

Decree affirmed.

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GEO. H. LUCAS and
ELIZABETH SCHLEDER,

Appellees.

vs.

O. A. SMITH and
BETTYE SMITH,

Appellants.

Appeal from
the Circuit Court
of
Tazewell County.

GRAVES, J.

Appellee Elizabeth Schleder was the owner and entitled to the possession of the real estate involved in this litigation by virtue of a master's deed thereof, issued and delivered to her as the purchaser thereof at a foreclosure sale. After the time for redemption from such sale had expired appellants, the mortgagors, remained in possession of the premises and appellee applied for and obtained a writ of assistance. It is from the order awarding the writ of assistance that this appeal is taken.

The writ of assistance is an appropriate process to be issued from a court of chancery to place the purchaser of mortgaged premises under a foreclosure sale in possession after the master's deed has been delivered to such purchaser and the time for redemption has expired. **Vahle v. Brackenseck** 145 Ill. 231. **Lambert v. Livingston** 131 Ill. 161. **Higgins v. Peterson**, 64 Ill. App. 256. It is not the institution of a new suit but is an incident to the foreclosure proceeding. **Lancaster v. Snow**, 184 Ill. 634. In an application for a writ of assistance titles cannot be tried. Only the right to

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possession is involved. **Kerr v. Brawley**, 193, Ill. 205.

Cigler v. Keinath 167, Ill. App. 65. The petition required no answer. **Wallwork v. Derby**, 40, Ill. 527. When no answer is necessary or when the answer under oath is waived no advantage can be taken of filing a sworn answer. **Beckerdike v. Allen**, 157 Ill. 95. **Adlard v. Adlard** 65 Ill. 212. Where an answer is necessary and one is filed, if the matter is submitted for hearing without a replication and without objection, no advantage can thereafter be taken of the absence of it. **Jones v. Nelly**, 72, Ill. 499. **Holmes v. Clifford**, 95 Ill. App. 245.

The decree of foreclosure provided in substance that appellants should pay to appellee, the holder of the mortgage foreclosed, the amount found due by a day fixed; that in default thereof the premises be sold; that at the expiration of the time of redemption the master should execute and deliver to the purchaser a deed for the premises sold; and that upon the delivery of such deed the holder thereof should be let into possession of the premises so conveyed. The record shows that the premises were sold and were purchased by appellee; that after the time of redemption expired the master executed and delivered to her a deed for the same, but that appellants did not deliver up possession of the same to

her, that ^{he}appellee then caused a copy of the order confirming the master's report of sale, and ^acopy of the master's deed to be served on appellant ^{dependent} O. A. Smith and thereupon demanded possession of the premises which he still refused to surrender.]

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It thus appears that appellee has complied with all the requirements of law and the terms of the decree under which she purchased the premises; that she was entitled to the possession of the premises in question and that the writ of assistance was properly issued.

The order of the Circuit Court is therefore affirmed.

Order affirmed.

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R. W. SUTTON,

Appellee,

vs.

ALEXANDER HANCE,

Appellant

Appeal from
the Circuit Court
of Douglas
County.

GRAVES, J.

This is an appeal from a judgement of the Circuit Court of Douglas County for \$250 in favor of the plaintiff in an action in trespass for false imprisonment.

The undisputed facts are that on Sunday, June 22nd, 1913, appellee was arrested by a policeman of the city of Newman and lodged in the calaboose of that city; that in the evening of that day he was released from jail; that on Monday the 23rd day of June, 1913, he appeared before Thos. E. Johnson, Police Magistrate of the city of Newman where a charge of disorderly conduct was then pending, took a change of venue and was afterwards found not guilty in the justice court in which the venue was changed, and was discharged. Whether the officer who arrested him on Sunday June 22nd, 1913 had a warrant at the time the arrest was made is controverted.

The evidence in the Circuit Court and the arguments of counsel here cover a much wider field than will be necessary for us to review.

Appellee in his brief and argument says:

"The appellant assumes in his brief that we are complaining of an act that was done under process issued by the court. That is not the theory of this case. This is an action of trespass for

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false imprisonment, and we proved that the appellee was arrested without a warrant by the police officers at the instigation of the appellant, and that he was arrested not because he had violated an ordinance of the city of Newman, aforesaid, or a statute of the state of Illinois, but because he had not treated the appellant in the way the appellant thought he should have been treated."

Again he says:—

"It was a matter for the jury to decide whether the appellee was arrested under the directions of the appellant without a warrant and was imprisoned for the reason that he had not treated the appellant properly, or whether appellee was arrested under legal process issued by a duly authorized court."

Again he says:—

"The appellant has discussed this case upon absolutely the wrong theory. He assumes that a warrant was issued and an arrest made on the warrant. This is not the fact, and this is not the theory on which we tried the case."

In these three passages appellee has clearly defined the basis of his claim for damage to be an arrest without a warrant when he had violated no state law or city ordinance, by police officers, followed by imprisonment in the calaboose of the city of Newman, all at the instigation of

appellant. It is not contended by appellee that if the arrest was made upon a warrant duly issued he has any right of action, even though such arrest was followed by imprisonment. We will dispose of the case on the version of appellee as to issues the tried as shown by the foregoing quotations.

[On the question whether the officer who made the arrest had a warrant when he did so, ~~appellee~~ ^{servant} when he testified in chief said the officer did not read a warrant to him. Later he said that he never heard or saw or had anything said to him about a warrant at the time the arrest was made; that he did not think he said to the officers at the time of the arrest that "they need not read the warrant", and
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"that he acknowledged service;" that he did not think anything was said about the warrant; that the officers told him he was arrested for drinking beer and disturbing the peace.

The docket entries of the police magistrate show ^d that a complaint was in fact and that a warrant was in fact issued on such complaint, but the entries in the docket do not show with definiteness when those things were done. An inspection of the complaint ~~which ap~~ ⁱⁿ ~~pellee mentions in his argument as having been introduced in evidence~~ ~~as defendant's Exhibit B shows~~ ^{the day before} that it was made on June 21, 1913. ^{the arrest.} The testimony shows ^{that} that the warrant issued on that complaint was lost and could not be found and produced on the trial, but ~~appellee~~ ^{defendant}, the police magistrate, the city marshal, and officer Ellington all testified ^{the day before the arrest} that it was issued on the evening of June 21st, 1913, and that the same was then delivered to officer Ellington to execute. The two officers also testify that they went together to the home of appellee on the morning ^{next} of June 22nd before six o'clock to arrest him, taking with them the warrant; that when they met ^{personally} ~~appellee~~ they told him they had a warrant for his arrest and exhibited it to him and told him what the charge was and that he said they need not read it, that he would "acknowledge" it; that they then took him into custody under the warrant and placed him in the calaboose to await trial.] This positive testimony of these four witnesses so over-

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whelms the qualified and uncertain evidence offered to show that the arrest was made without a warrant as to establish beyond a doubt, that the arrest was made on a warrant duly issued out of a court having authority to do so, issued on a complaint charging him with the offense of disorderly conduct.

As appellee bases his only right to recover on the contention that he was arrested and imprisoned by officers acting without a warrant and at the instance of appellant who was actuated by some fancied personal wrong, and as the evidence wholly fails to establish that claim,

it follows that the judgement must be reversed with a finding of fact to be incorporated in the judgement of this court that the arrest complained of was duly made by an officer under a warrant duly issued out of a court of competent jurisdiction, upon a complaint charging appellee with disorderly conduct.

Reversed with a finding of fact.

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GENERAL No. 6491. OCTOBER TERM A. D. 1915. AGENDA No. 54.

EVA CONRAD, Appellee

vs.

ST. LOUIS, SPRINGFIELD & PEORIA
RAILROAD, a Corporation, Appellant.

Appeal from the
Circuit Court of
Tazewell County.

GRAVES, J.

[^{Plaintiff} Appellee boarded a car of ^{defendant} appellant at Peoria, Illinois, to be conveyed to Mackinaw. The car was well filled. Some of the witnesses say there were no vacant seats and others that there were. Appellee says she saw none. After the car had gone a short distance it came to a stop and the evidence tends to show that when it started again it did so with a jerk, although there ^{is} quite a sharp conflict in the evidence on that point. Whatever the facts ^{are} as to the suddenness with which the car was started, ^{now} appellee was jerked, thrown or fell down to the floor of the car. There ^{is} a conflict in the evidence in regard to whether she came to a sitting posture or was prostrate upon the floor. She was assisted to arise and accepted a proffered seat and continued her journey to her home town, where she alighted from the car and walked to her home about four blocks. The next day she went to church and Sunday school, where she says her neck and hips hurt her severely. From there she went to a doctor's office and was advised to put a hot water bottle on her hips and hot applications on her neck, which she did with good results, but she claims that she

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suffered considerable pain as well as other ill results of the fall for several weeks. The extent of her injuries ^{is} also seriously contested. She brought this suit later, charging in the first count of her declaration that ^{defendant} appellant negligently managing and operating its car and particularly that it negligently and violently starting its car, and in the second count that the car was crowded with passengers and that while she was attempting to get a seat ^{defendant} appellant violently, carelessly and negligently started its car suddenly and with great force and threw her down. She secured a verdict and judgment for \$3375.00, from which this appeal is prosecuted.

In that state of the record it is important that the jury should be instructed with substantial accuracy.

Appellant complains that instructions numbered 1, 4, 11, 14 and 15 asked by appellee and given with some modifications by the court are erroneous.

Instruction number one is in the following language:

"If you find from the evidence that the plaintiff has proven her case as charged in the declaration or some count thereof,

by the greater weight of the evidence, then you should find the issues for the plaintiff."

Appellant's contention was at the trial and is here that appellee was guilty of contributory negligence in not being seated upon entering the car and in standing in the aisle when she could by the exercise of due care have been seated. The language used in both counts of the declaration to negative contributory negligence was limited to the

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instant of the injury. The law requires that one claiming to be injured by the negligence of another must aver and prove that he or she was not only exercising due care at the time or instant of the injury but while getting into the situation where the injury was received. **Krieger v. Aurora Elgin & Chicago R. R. Co.**, 242 Ill 544; **North Chicago Street Ry. Co. v. Gossar**, 203 Ill. 608; **Cole v. City of East St. Louis**, 147 Ill. App. 234; **Village of Lockport v. Lecht**, 221 Ill. 41. It follows that even if appellant had proven her case as charged in the declaration she would not be entitled to recover unless she also proved that she was not negligent in getting herself into the position where she was injured. The instruction directed a verdict and should have included all the elements necessary to her right of recovery.

Instruction number fifteen is erroneous for the same reason.

Instruction number four announces the law to be that a common carrier is held strictly responsible for all consequences which directly flow from the negligent conduct of its servants, and ignores the question of contributory negligence. It was error to omit that element.

Instruction number fourteen as originally offered by appellee clearly and correctly announces the rule of liability of common carriers including the element of due care necessary to be used by the passenger. It was modified by limiting the necessity of the exercise of due care on the part of appellee to the time of the injury and "immediately" before that time. The care which a person must exercise

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for his own safety before he can recover for injuries received by reason of the negligence of others must be exercised not only at the instant of the injury, but during such prior time as his negligence could contribute to the injury. See cases cited.

While it is conceivable that circumstances can exist which result in injury to a person, where he would be entitled to recover upon a showing of his own due care for his own safety at and "immediately" before the injury or even at the instant of the injury, such circumstances would necessarily be such as would exclude the possibility of any negligence of his more remote from the injury, contributory to it. We think under the facts in this case the modification of this instruction was erroneous as unduly restricting the time which appellee was required to exercise

due care.

Instruction eleven relates to what elements of damage the jury were authorized to consider. Appellant claims it is erroneous because it authorized the jury to consider all elements of damage concerning which there is any evidence in the case, regardless of whether all such elements of damage were claimed by appellee in her declaration or not. Both evidence and instruction should be limited to damages declared on, but where evidence is introduced without objections on issues not made by the pleadings or where there is no evidence offered on issues not included in the pleadings, the giving of such an in-

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struction cannot be held to be a reversible error. We fail to find any evidence in this record tending to show damages not claimed in the declaration. The error complained of is therefore harmless in this case. **Camp Point Mfg. Co. v. Ballou**, 71 Ill. 417. This instruction is however erroneous because it contains the following unintelligible language in an attempted description of the elements of damage the jury might consider " * * * also **such prospective** suffering and loss of health, if any, as the jury may believe from the evidence before them in this case the plaintiff **has** sustained by reason of such injuries, if any, **in the future upon the plaintiff.**" In other words the jury were told they were authorized to consider in fixing appellee's damages such **prospective** suffering, etc., as she **has** sustained **in the future.** It reminds the writer of the speech of the would-be-elloquent citizen in which he said "As I look back into the future, I see the footprints of an Almighty hand." We think this instruction must have had a tendency to confuse the jury on the question of damages and that it must have been harmful.

Complaint is made that the court erred in permitting Dr. Bailey to answer a hypothetical question in which "pain in the buttocks" was one of the elements, because there was no evidence that appellee suffered pain there. The evidence of appellee discloses that she suffered severe pain in the hips. Webster's International Dictionary defines buttocks to be "that part of the back of the hips which in

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man forms one of the rounded protuberances on which he sits; the rump". The evidence in the record was sufficient basis for the hypothetical question.

It is next urged that appellant was not permitted on cross examination of Dr. Gale to put to him a hypothetical question, assuming facts not yet proven, but which counsel for appellant advised the court they expected to prove.

On cross examination of an expert witness any fact which in the sound discretion of the court is pertinent to the inquiry, whether the same has been testified to or not may be assumed in a hypothetical ques-

tion to test the accuracy, learning or skill of the witness. **West Chicago Street Ry. Co. v. Fishman**, 169 Ill. 196; **Eckels v. Halsten**, 136 Ill. App. 111. **City of Chicago v. Rosenbaum**, 126 Ill. App. 93; **Botwinis v. Atgood**, 113 Ill. App. 188; **C. & E. I. R. R. Co. v. Wallace**, 202 Ill. 129. The question propounded had reference to conditions of health which appellee was claiming were the result of the accident on appellant's car. The witness had expressed his opinion on the basis of the injury being caused by that accident. Appellant claimed it was caused by an automobile accident in which appellee had previously been involved and sought to test the accuracy of the witnesses testimony by injecting that element into the question. We think the examiner was clearly within his rights and that the objection to the question should have been overruled.

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The proof tends to show that at the time of or shortly after the accident the conductor had some talk with appellee concerning the manner in which she was injured, and that some time later he made a report in writing to the superintendent of the road in which he attempted to recite what appellee then said to him. The conductor took the stand and gave his version of the conversation he then had with appellee and further stated that he had made a report of the accident to the superintendent and identified the report. Appellant then offered that report in evidence and on objection to its introduction it was excluded by the court. This action of the court is assigned for error. The report was properly excluded. It was merely a recital by the conductor of his understanding of the circumstances of the accident and of what was said by appellee. It was not the best evidence and was at the best a self-serving statement.

The correctness of other rulings of the court on the admission and exclusion of evidence have been argued by appellant, but we can perceive no error therein.

It is also urged that the conduct of counsel for appellee during the trial and particularly during the closing argument was such as to prejudice appellant and require a reversal of the case. So much of the conduct complained of as occurred during the argument to the jury is not shown in the bill of exceptions, and therefore cannot be con-

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sidered by this court on appeal. What is done by the judge or in his presence is within his knowledge and must be recited in a bill of exceptions over his certificate and cannot be made a part of the record by ex parte affidavits. **Mayes v. People**, 106 Ill. 306; **Scott v. People**, 141 Ill. 195; **Payton v. Village of Morgan Park**, 172 Ill. 102; **Barnes v. Barnett**, 188 Ill. App. 32; **The People v. Nall**, 242 Ill. 284.

The conduct of counsel that is shown in the bill of exceptions while improper was not such as in our judgment was calculated to prejudice appellant...

For the errors pointed out the judgment of the Circuit Court is reversed and the cause is remanded to that court.

Reversed and remanded.

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ADRIAN E. COOPER and CHARLES
COOPER, Partners doing business under
the firm name and style of COOPER
BROS.,

Appellants,

vs.

THE BROWN-DANSKIN COMPANY, a
Corporation,

Appellee.

Appeal from the
Circuit Court of
Macoupin County

GRAVES, J.

Appellants at the time of the occurrences out of which this litigation arose were partners in a mercantile business in Palmyra, Illinois, and appellee was a corporation engaged in the business of real estate brokerage, with offices in Minneapolis, Minnesota and Hillboro, North Dakota. On August 5, 1911 negotiations between the parties culminated in a contract in writing duly executed, by which appellants agreed to purchase 320 acres of land in North Dakota for the consideration of \$19,200. The contract in so far as it relates to the manner and time of payment of this sum is in the following language:

"\$10,700.00 in mortgage or mortgages on said land which second party hereby assumes and agrees to pay or give as follows:

\$800.00 payable 1st day of December, 1912,

\$800.00 payable 1st day of December, 1913,

\$800.00 payable 1st day of December, 1914,

\$800.00 payable 1st day of December, 1915,

\$800.00 payable 1st day of December, 1916,

\$700.00 payable 1st day of December, 1917,

\$6,000.00 payable 1st day of December, 1917,

"\$8,500.00 of said purchase price is represented by conveyance from party of the second part to any person said first party may designate at any time before the closing of this deal, by good and sufficient warranty deed the following described premises, free of all encumbrances, taxes and assessments of every kind and character, except those herein mentioned, viz. 2 story residence built two years ago in Palmyra, Ill., at \$3,500.00, also \$5,000.00 in general stock of goods at cost price and fixtures at present worth not exceeding \$400.00,

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same being at present a stock of about \$10,000.00 which second party is to reduce to at least \$7,500.00 by December 1, 1911, if possible, and soon as this is done first party to take charge and pay second party proceeds at cost price of goods down to \$5,000.00 worth of goods. Invoice to take place when first party takes charge.

"Second party hereby agrees to apply on that portion of mortgages carried by first party on Dakota land, the proceeds coming to him from sale of 320 acres in Macoupin County, Illinois, soon as realized by him. The sum of \$320.00 is to be endorsed on \$700.00 payment due 12-1-1917 as a reduction in price, and in event second party can pay up all deferred payments over \$6,000.00 by time deal is closed first party hereby agrees to reduce purchase price of land to \$57.50 per acre, net to said first party.

"It is expressly understood and agreed between the parties hereto that this agreement shall extend to and be obligatory upon the heirs, executors, administrators, successors and assigns of the respective parties hereto."

The deal was to be closed by December 1, 1911. On November 8, 1911 the parties entered into a supplemental contract in the following

language:

"This agreement made and entered into by and between the Brown-Danskin Company, party of the first part, and Adrian E. Cooper, party of the second part, Witnesseth that, Whereas, on the 5th day of August, 1911, said parties entered into an agreement for the exchange of certain lands in North Dakota for a dwelling house and stock of goods in Palmyra, Illinois, and whereas said stock has not been reduced as provided in said contract; Now this agreement is for the purpose of readjusting the agreement relative to the disposal of said stock of goods and in consideration of said stock of goods which has this day been conveyed to Steward J. Danskin by Cooper Brothers, the said first party hereby agrees to pay second party two thirds of all money received on the sale of said stock until second party has received enough cash to amount to the difference between five thousand (\$5,000.00) and the amount of invoice which is to be made over under original contract, for the purpose of paying second party cash for all above five thousand dollars, it being agreed that enough money out of the second one thousand dollars to be paid second party shall be used to pay mortgage and interest now against dwelling house being traded first party, and that second party shall have credit on purchase price of North Dakota land for the five thousand dollars mentioned."

The bill of sale mentioned in the supplemental contract was also dated on November 8th, 1911 and is in the following language:

"KNOW ALL MEN BY THESE PRESENTS, That Cooper Brothers, of the County of Macoupin, and State of Illinois, party of the first part, in consideration of the sum of One Dollar and other valuable considerations to them in hand paid by Stewart J. Danskin of the County of Traill, and State of North Dakota, party of the second part, the receipt whereof is hereby acknowledged, does hereby grant, bargain, sell and convey and confirm unto the said party of the second part, his executors, administrators and assigns forever, the following described goods, chattels and personal property, to-wit:—

"All their general stock of goods, including clothing, dry goods, boots and shoes, groceries, queensware, etc, and all fixtures owned by said first party, all of said stock of goods, fixtures, etc., being located in the J. C. King building in Palmyra, Illinois.

"TO HAVE AND TO HOLD THE SAME, Unto the said party of the second part, his executors, administrators and assigns, Forever—"

—(Page 2)—

Upon the execution of the bill of sale and the supplemental contract the store containing the property described in the bill of sale was closed and an inventory of the said property was taken according to contract. From the inventory the value of the property was found to be \$14,454.40 figured at cost price. Upon the completion of the inventory the property was turned over to ^{Steward J. Danskin} ~~appeller~~, and ~~appellants~~ were given credit of \$5,000.00 on the purchase price of the Dakota lands. ^{Steward J. Danskin} ~~Appellee~~ then proceeded to sell the goods. Part of them were sold at public auction and part at private sale. During the sale ^{Steward J. Danskin} ~~appellee~~ put into the store new goods amounting to \$611.11 which were sold with the other property. The total sale amounted to \$7,552.09. Two-thirds of that amount or \$5,034.73 was turned over to ^{Steward J. Danskin} ~~appellants~~ in cash while the sale was going on, which added to the \$5,000 credit they received on the purchase price of the Dakota lands makes \$10,034.73 that they have realized from the stock of goods in question.

The deed for the lands in North Dakota purchased by ^{Steward J. Danskin} ~~appellants~~ was

duly executed by appellee and delivered, and the deed to the residence property in Palmyra, for which appellee was to receive at \$3500 on the consideration to be paid for the North Dakota lands, was duly executed by appellants and delivered. Notes for sums aggregating \$10,700 for the deferred payments on the North Dakota lands were also executed by appellants and delivered according to the terms of the

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contract of August 5, 1911. This suit was brought by appellants to recover the difference between \$14,454.40 the invoice price of the goods, and \$10,034.73, the amount they have already received from the same, or, \$4,419.67, on the theory that the contract of August 5, 1911 and the contract of November 8, 1911, when construed together amounted to a sale of the stock of goods for the amount of the invoice at cost price or \$14,454.40 to be paid for by a credit of \$5000 on the purchase price of the Dakota lands and the balance in cash. The case was tried by the Court without a jury. The court found the issues for appellee and entered judgment against appellants in bar of their action and for costs.

Appellees insist that these contracts and the bill of sale should be construed as a transfer of the personal property in question in trust only, the proceeds to be distributed, two-thirds to appellants and one-third to appellee.

Contracts must be so construed as to carry out the intention of the contracting parties as expressed in the language used. **Wilson v. Harlow**, 66 Ill. 385; **O. H. Jewell Filter Co. v. Kirk**, 102 Ill. App. 246; **Walker v. Tucker**, 70 Ill. 527; **Lindorf v. Cope**, 122 Ill. 317; **Mitt v. Karl** 133, Ill. 65; **Snead v. Merchants Loan and Trust Co.**, 225 Ill. 442.

It seems to us that the parties in making these two contracts have left little doubt about what they intended to express in them. In our opinion when construed together they clearly state, so far as the same affects the present litigation, that appellants are to

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purchase 320 acres of land in North Dakota for \$60 per acre; that appellee is to purchase from appellants a residence property in Palmyra, Illinois, for \$3500 and a stock of merchandise for whatever sum the same amounts to when inventoried at cost price; that the \$3500 consideration to be paid for the Palmyra residence property and \$5000 of the consideration to be paid for the merchandise is to be applied to the payment of \$8500 of the consideration agreed to be paid for the North Dakota land; that for the balance of the consideration to be paid for the North Dakota land, amounting to \$10,700 appellants are to give notes, due at stated times fixed in the contract of August 5, 1911; that if the merchandise shall inventory at cost price more than \$5000 appellee is to pay appellants in cash the difference be-

tween \$5000 and the amount of the inventory.

The only parts of these contracts that at first blush seem doubtful are those regarding the time of payment of the amount the invoice of the merchandise exceeds the sum of \$5000. We think even that doubt is more apparent than real. These contracts were made with the evident exception that the goods would sell for more than the invoice price. Undoubtedly that ^{the} exception accounts for the absence of a specific stipulation, as to when any deficiency should be paid, that might arise if the goods did not sell for the invoice price.

The contract of August 5, 1911 provides in substance that appellants should reduce the stock of merchandise if possible to at

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least \$7500 by December 1, 1911 at which time appellee should take charge of it, and as there is no stipulation for any credit to be given appellee for the amount the invoice should exceed \$5000, it must be assumed that the contracting parties intended that such excess should be paid for when the stock of goods were turned over to them. Appellee later becoming desirous of securing the possession of the merchandise before December 1, 1911, induced appellants to make the contract of November 8, 1911 and the bill of sale of the same date and to turn over possession of the goods. This second contract made but two material changes in the original agreement. The substance of the first change is that appellees were to have immediate possession of the merchandise instead of waiting until December 1, 1911 as originally agreed. The substance of the second change is that appellants should receive two-thirds of the proceeds of the sale from time to time as the sale progressed instead of waiting until December 1, 1911.

No change was made in the time when the final adjustment of the deal was to be made. We, therefore, think the two contracts must be construed to provide for the payment in cash on December 1, 1911, by appellee to appellants of the balance of the difference between the invoice price of the merchandise purchased and the sum of \$5000 which they had not received prior to that date.

The contention that these contracts should be construed to mean that appellants were to receive only the difference between \$5000 and

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and what the goods sold for, is not only contrary to any reasonable construction of the language employed, but is contrary to the construction of the parties themselves at the time, for the record shows that appellee not only gave to appellants the agreed credit of \$5000 on the consideration to be paid for the Dakota lands, but actually paid appellants \$5,034.73, in cash which was approximately \$3000 more than was realized by appellee from the sale of the entire stock of merchandise.

It is manifest that appellees either made a poor bargain when they

agreed to pay \$14,454.40 for this stock of merchandise or else that they failed to secure from the sale of the same what they should have done, but no claim is made that appellants were guilty of any improper conduct in inducing appellee to make the contract or were in any way responsible for the fact that the goods did not sell for what they should. Appellee must lie in the bed it made for itself.

We find from the evidence before us that the invoice at the cost price mark of the merchandise in question amounted to \$14,454.40; that appellants have received by way of consideration for the sale of that merchandise a credit of \$5000 on the consideration agreed to be paid by them for the North Dakota land and \$5034.73 in cash; that there was due appellants on December 1, 1911, from appellee a balance of \$4,419.67 of the agreed consideration for said merchandise, which is yet unpaid;

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The judgment of the Circuit Court of Macoupin County is therefore reversed and judgment is entered here, in favor of appellants and against appellee for \$4,419.67, also judgment against appellee for costs in both this and the Circuit courts, and execution on such judgment is awarded.

Reversed with judgment here.

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IRA WELLS, Appellee,

vs.

ANDREW GRAHAM, Appellant.

Appeal from

McLear

Opinion by Thompson, J.

This is a suit begun by Ira Wells against Andrew Graham before a justice of the peace to recover damages for a breach of warranty on a horse sold to plaintiff by defendant. Plaintiff obtained a judgment for \$98 before the justice from which the defendant took an appeal to the Circuit Court where trial resulted in a verdict for \$82.50 in favor of plaintiff on which judgment was rendered. The defendant again appeals.

In February, 1914, appellee, a farm laborer, entered the employ of appellant. About April 1, appellee bought a horse of appellant for which he agreed to pay \$175 and paid \$115 on the purchase. The remaining \$65 appellant kept out of appellee's wages when he quit work on the 12th of May. [Appellee had driven the horse before buying it and it showed a lameness at that time. Appellant told the appellee that the lameness was caused by a stone bruise or cut in the frog of the foot, that the horse had never been lame before and that it was sound and would get all right. Appellee testified that at the time he purchased the horse appellant-

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said it was sound and would get all right. There is proof in the record that the horse was not sound but was what is known among horsemen as a "crumper and a freezer"; that is a horse, which when it is backed up has no use of one hind leg. A witness, who broke the horse for appellant, testified that he called appellant's attention to the fact at that time that he had a three legged horse. Appellant denied that he warranted the horse or that he knew the horse was not sound, and that the man who broke the horse called his attention to the fact that he was a crumper. In the conflicting state of the evidence there is no reason why this court should interfere with the verdict of the jury which has been approved by the trial court, who saw and heard the witnesses and had superior advantages to judge of their credibility.

It is contended that because the appellee had seen that the horse showed lameness before the sale, that therefore the rule of caveat emptor applies and that appellant cannot be held on the warranty. If the appellant, knowing that the horse was permanently diseased, warranted the horse to be sound and all right, and told appellee that the lameness was caused by an injury to the frog of the foot made by a stone which would get well, when he knew such representation to be false, and the appellee

relied on the representation of appellant and had no information to the contrary, the doctrine

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of caveat emptor does not apply. **Applebee vs. Rumery**, 28 Ill. 280; **Kenner vs. Harding**, 85 Ill. 264; **Ruff vs. Jarrett**, 94 Ill. 475; **Kohl vs. Lindley**, 39 Ill. 202; **Emrick vs. Merriman**, 23 Ill. App. 27.

It is also insisted that the amount of the judgment is not sustained by the evidence. Frank Riley a horseman testified that if the horse had been sound he would be worth from \$150 to \$175, but with the lameness he had he was worth about \$50. The evidence amply sustains the judgment.

It is argued that the second instruction given for appellee, which directs a verdict if from the evidence certain facts are found to be true, is erroneous in that it does not state that the representation of soundness must have been made at the time of the sale. The instruction is in part: "The court instructs the jury, that if you believe from a preponderance of the evidence that the horse in question was unsound and it was known to the defendant when he sold the horse to the plaintiff and that the defendant told the plaintiff the horse was sound and the plaintiff purchased the horse without knowledge of the unsoundness and relying", etc. Sufficient of the instruction has been quoted to show that the representation as to soundness referred to in the instruction is a representation made at the time of the sale.

There is no error in the case and the judgment is affirmed.

Affirmed.

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GABRIEL C. STAUFFER,

Plaintiff in Error,

vs.

THE STATE BANK OF MANSFIELD,

Defendant in Error.

Error to Piatt.

Opinion by Thompson, J.

[A judgment for \$600.16 was entered by confession in the office of the clerk of the circuit court of Piatt County on November 5th, 1914, against Gabriel C. Stauffer in favor of the State Bank of Mansfield, on a promissory note for \$550 dated July 11, 1913, due six months after date with interest at seven per cent per annum from date. The defendant filed a motion entitled in said cause to the February Term, 1915, that the judgement be set aside and that leave be granted him to plead and defend in said cause. Attached to the motion ^{was} an affidavit verified by the defendant ^{on} January 27th, 1914, to which ^{was} attached as an exhibit, a copy of a bill in chancery, which ^{was} made a part of the affidavit, and which the affidavit states ^{was} filed on October 28th, 1914, to the February Term of the Circuit Court of Piatt County. The bill ^{was} filed by Gabriel C. Stauffer, complainant, against the State Bank of Mansfield, William H. Firke and William H. Burns. It prays for an accounting between said bank and the other defendants concerning business transacted between complainant and Firke and Burns, before the bank was organized, and between the bank and Firke and Burns, officers of the bank,

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(and the complainant as a depositor in the bank, and that the defendants be enjoined from reducing to judgement a note made by complainant in error for \$5300, dated March 22, 1913, and offers ^{to} on an accounting, to pay whatever sum, if any, ^{may} be found due from complainant to any of the defendants, and prays that the defendants or such of them, if any, as ^{might} be found indebted to complainant be decreed to pay to complainant such sum, if any, as ^{might} be found due to him.

The bill ^{was} not verified. The record ^{did} not show any summons was issued and served on the defendants or any of them. It ^{did} not mention the note upon which the judgement was entered in this case, except by inference that the defendants ^{might} hold other notes against complainant than the \$5300 note mentioned.

The affidavit made by Stauffer states that he believed that on an accounting the note sued on ^{would} be shown to be without consideration, and that he had no knowledge on October 28, 1913, that the State Bank of Mansfield held a note for \$550 against him.

On February 3rd, the second day of the February Term, the defendant entered a motion "for leave to plead," and for leave to file an additional affidavit and the court entered an order that the defendant have until February 5th, to file such additional affidavit. On February 20th, the defendant, having failed to file any additional affidavit, elected to abide by the showing on file. Thereupon the court overruled the motion

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for leave to plead. ~~From that order the defendant prosecutes this writ of error.~~

The plaintiff in error argues two questions: 1st that the judgement by confession cannot be sustained because there was a prior suit pending between the plaintiff and the defendant involving an accounting and that Stauffer was seeking a discovery from the Bank of the State of the accounts between the parties. 2nd, that the court erred in holding that the showing made by the plaintiff in error was insufficient to require that the judgement should be opened and in refusing to grant to plaintiff in error leave to plead.

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The affidavit ~~does~~^{did} not state any facts concerning the note on which the judgement was entered. All that ~~the affidavit states~~^{it} concerning this note ~~is~~^{was} that prior to October 28th, the time the bill in chancery was filed plaintiff in error had no knowledge that the defendant in error "was possessed of or claimed that he owed the note in the principal sum of \$550 attached to the cognovit," and that he believed that upon accounting being had he had a good defence to the whole of plaintiff's bill. The affidavit nowhere denied that he executed the note and ~~does~~^{did not} offer to pay what may be found due on an accounting. No facts are set up showing a defence, hence there was no error in overruling the motion for leave to plead.

The plaintiff in error, defendant in this suit is the complainant

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in the chancery suit. The chancery suit not only prays an accounting between the plaintiff in error, a corporation, and defendant in error but also between plaintiff in error and Firke and Burns for a time before the defendant in error was incorporated, hence the two suits are not between the same parties.

The relief sought in the two actions is dissimilar. Defendant in error asked for, and obtained a judgement on a note executed by plaintiff in error. Plaintiff in error asks for an accounting over a period of several years and says he will pay what, if any thing, may be found due defendant in error. The note, on which this judgement was entered, not being mentioned in the bill in chancery is not necessarily involved in it.

The plaintiff in error by making necessary allegations of fact, properly verified, might have secured an injunction restraining the defendant in error from causing any judgements to be entered against him upon his

fling a bond idemnifying defendant in

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error against loss, if the injunction should not be sustained on a final hearing, but he does not ask that a temporary injunction be issued. There is no statute in this state requiring parties to actions begun in the circuit court to plead a set off or counter claim. They may bring independent actions. **Tompkins vs. Gerry**, 43 Ill. App. 255, **Pollock vs. Kinman**, 176 Ill. App. 361. Plaintiff in error, if his contention could be sustained, might keep his chancery suit pending until he had disposed of all his property, and later, when the chancery suit is ready to be disposed of, dismiss his bill and thereby prevent defendant in error from collecting its debts against him. The affidavit and bill filed do not show that there was another action pending necessarily involving the note on which this judgement was entered. There is no error in the case; the order refusing leave to plead is affirmed.

Affirmed.

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GENERAL No. 6432.

OCTOBER TERM 1915.

AGENDA No. 11.

PETER ARMENTROUT. Appellant,

vs.

CENTRAL TRUST COMPANY OF NEW YORK, Appellee.

Appeal from

Sangamon

Opinion by Thompson, J.

This is a suit in equity begun in November, 1911, in the circuit court of Sangamon county by Peter Armentrout, a citizen and resident of the State of Iowa, against the Central Trust Company of New York, hereinafter called the Trust Company, a corporation organized and with its principal place of business in the State of New York.

[The bill alleges that prior to October 18, 1882, a corporation, the Mutual Reserve Fund Life Association, hereinafter called the Life Association, was organized under the laws of the State of New York for the purpose of insuring the lives of its members on the assessment plan; that on October 18, 1882, a certain agreement in writing, entitled a Deed of Trust, was made between the Life Association and the Trust Company containing among other provisions, the following: (1) that said Life Association desiring to set aside a reserve fund for the benefit of its members, the Trust Company agrees to receive such funds and invest them in the name of the Life Association on the written order of the president of the Life Association in such securities as shall be directed by the directors of the Life Association and approved by the president of the Trust Company,

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such securities to be sold, by the Trust Company, upon the written order of the president of the Life Association accompanied by a certified copy of a vote of the board of directors of the Life Association, and the proceeds deposited to the credit of the Life Association in the Trust Company; (2) that upon receipt of a certified copy of a vote of the directors of the Life Association authorizing a transfer of any portion of the Reserve Fund to the death fund account such transfer shall be made; (3) the Board of directors of the Life Association may order, the whole or any portion of the Reserve Fund including the investments, transferred to any State Insurance Department or any other Trust Company, with which a contract may be made, which has been endorsed approved by one of the Justices of the Supreme Court of New York and (4) in case of a dissolution of the Life Association the entire reserve fund shall be divided among the members of the association.

The bill further alleges that in October, 1884, the complainant became a member of the Life Association and received a certain certificate

201-313

stating that at the death of complainant, in consideration of the payment of annual dues and all mortuary assessments, there shall be paid to the daughter of complainant \$2,000, from the death fund or from the next assessment. The certificate ^{was} set forth at length and contains among other provisions, the following: (1) that twenty-five per cent of the assessments shall be set apart for the reserve fund to be deposited with a trust

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company; the reserve fund in excess of \$100,000 may be applied in payment of claims in excess of American Experience Tables of Mortality, (2) that after each period of five years a bond will be issued for an equitable portion of the reserve fund, available ten years from its date towards paying future dues and assessments, and should membership cease by death or otherwise, any portion of the principal not thus used shall be used to increase the bonds issued at the next period to other members of the association holding certificates issued the same year and that in accordance with the trust agreement, various sums of money were from time to time deposited, until the fund was in excess of two and one half million dollars, and that in 1889, the Life Association issued to complainant a quinquennial bond for \$29.57, and similar bonds to members insured in 1884.

It ^{was} also alleged that the Life Association continued to do business until April 22, 1908, when it was dissolved by action of the Supreme Court of the State of New York, in accordance with the laws of said state.

The original bill alleged that, at the time of the dissolution of the Life Association it was bankrupt, and its assets passed through the hands of Receivers appointed by the Circuit Court of the United States of the Southern District of New York, "and such assets were not sufficient to pay but a very small per cent of the actual amount due at the time of such dissolution to beneficiaries of deceased members, and final distribution

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of all such assets has been made by such receivers and said assets have been all so paid out by them"; that complainant kept and performed all the agreements on his part to be performed and paid all assessments made on him by said association; that about 300,000 membership certificates were issued; that the portion of the reserve fund that would have gone to members whose certificates lapsed amounted to \$25,000 per year for 15 years and became the property of the complainant and other members similarly situated; that the number of members similarly situated to complainant is 200, and that the interest of complainant in the reserve fund at the time of the dissolution was about \$25,000; that the Life Association refused to make the quinquennial apportionments to complainant and others after that made in 1889, and the Life Association has never paid to complainant or other members any of the bonds; that by the seventh paragraph of the certificate, in case of dissolution of the association the entire reserve fund shall be divided among the then members

of the association; that the reserve fund at the time of the dissolution was \$3,000,000, all of which belonged to complainant and others similarly situated; that complainant has repeatedly demanded an accounting of the defendant Trust Company, and the defendant refused to account and denied it has any funds belonging to the reserve fund. The complainant suing for himself and others similarly situated prays for an accounting and for general relief.

A demurrer was sustained to the original bill. Complainant then

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amended by omitting that part of the bill stating the Life Association was insolvent and administered upon by the Federal Court, and inserting ^{the} ~~inserting~~ *insulating* that at the time of making the agreement called a trust deed the Trust Company knew of the provisions of the constitution of the Life Association concerning the reserve fund which ^{were} ~~are~~ set forth more in detail. A demurrer was again sustained to this bill as amended and a decree entered dismissing the bill. The complainant appeals.

Counsel for appellant have assigned error both upon the sustaining of the demurrer to the original bill, and to the amended bill. The bill before it was amended alleged that the Life Association was dissolved by the action of the Supreme Court of New York, and that at the time of its dissolution, it was bankrupt and its assets were administered upon by the Circuit Court of the United States and were only sufficient to pay a very small percentage of the sums due beneficiaries of deceased members, and final distribution of all such assets was made and such assets have all been paid out.

The contract called a deed of trust and the certificates issued by the Life Association with its constitution and by-laws appear to have been construed in the litigation referred to in the original bill in which the Life Association, holders of certificates and the Trust Company, appellee, were parties. The court held, that such agreement imposed no duty of distribution on the Trust Company, and that in such dissolution in an

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action by the state, a Federal Court, having charge of the administration of its assets, had power to and did order the Trust Company to turn over the securities and funds to the court's receivers for distribution with the other assets. **Robinson vs. Mutual Reserve Life Ins. Co. and Scoville vs. Same**, 162 Fed. R. 798. The provisions of the agreement in controversy, that in case of dissolution the reserve fund should be distributed among its members in proportion to the assessments paid by them cannot be enforced against creditors where the association is wound up by insolvency. Same cases, 175 Fed. R. 624. The court also held that a reserve fund may be created, which is immune against general creditors, in the nature of a trust to be devoted to the payment of assessments or to the payment of death losses thus benefiting beneficiaries, and that an examination of the constitution, by-laws and certificates of the Life Association

supports the conclusion that the funds identifiable as part of the old reserve fund, which have come to the possession of the receiver are pledged, first to pay death claimants under assessment policies. **Robinson vs. Mutual Reserve Life Ins. Co; Scoville vs. Same**, 189 Fed. R. 347. If appellant, after amending his bill, can assign error on sustaining the demurrer to the original bill, it is clear that the contract in question has been given the construction that unpaid death claims have the first right to the reserve fund. The original bill having alleged that all such funds had been distributed, appellant clearly could not ask for a second payment of funds

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which he alleged had all been distributed.

The bill as amended omitted the allegations concerning the appointment of a receiver and the bankruptcy of the Life Association and alleges that bonds available for the payment of assessments should have been issued every five years to the yearly classes; that bonds to appellants class were issued in 1889, and none thereafter, although the Life Association continued in business until 1908. The bonds were not issued by the Trust Company but by the Life Association. The allegation that the Life Association was dissolved in 1908 remains in the bill. Under the bill as it now is, bonds should have been issued to appellants class in 1894, 1899, and 1904. None were issued. The agreement to maintain the reserve fund is between the appellant and the Life Association in the constitution of the Life Association and the benefit certificate. The agreement called the trust deed is between the Life Association and the Trust Company. That agreement provides that the Trust Company can not take any action in relation to making investments except under the direction of the Life Association; that none of the investments were permitted to be in the name of the Trust Company, that they must all be in the name of the Life Association; that the Life Association may order all securities sold, and may by a vote of its directors order any portion of the reserve fund transferred to the death fund, and may order the whole or any portion of the reserve fund, including investments, transferred to any State Insurance Department

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or to any trust company with which a contract has been approved by a Justice of the Supreme Court of New York.

There is in the bill neither any allegation that the court, that dissolved the Life Association in 1908, did not dispose of and distribute the reserve fund, nor that some other court has not ordered such distribution or that there is now any reserve fund, remaining in the possession of appellee, or that the reserve fund has not been distributed or applied in payment of death claims, or that the Life Association while doing business did not have all such reserve fund transferred from the

appellee.

The Trust Company had no voice in transferring the funds either to the death fund or to some other trust company when ordered to do so by the Life Association.

The bill sets forth a copy of the bond issued to appellant in 1889, with an attached statement of the reserve fund. The statement shows that of the fund, \$300,000 was then on deposit with the American Loan Trust Company of New York, so that from the bill it appears that part of the reserve fund was, in 1889, in a depository other than appellee.

The appellant in the original bill alleged that all the funds of the Life Association were distributed by the bankruptcy court. The amended bill omits that allegation, and does not contain any allegation showing that the fund had not been fully disposed of, and that there are reserve funds in the possession of appellee as trustee for the Life Associ-

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ation to which appellee is entitled. Nothing will be inferred in favor of a pleader which has not been alleged. The law does not presume that a party's pleadings are less strong than the facts of the case will warrant. 4 Encyc. of Pl. and Pr. 746. The court would not be authorized to draw inferences in favor of appellant that facts exist concerning which the bill contains no allegations.

The Life Association, under the cases cited, was the proper party with whom appellee should account. There could not be a complete dissolution of the Life Association without a full disposition of all the reserve fund. The bill is fatally defective in that it fails, in alleging that the Life Association was dissolved by an order of the Supreme Court of New York in 1908, to allege that it was dissolved leaving the reserve fund undisposed of and in the custody of appellee. The demurrer was properly sustained; the decree is affirmed.

Affirmed.

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GENERAL No. 6433. OCTOBER TERM 1915. AGENDA No. 59.

GEORGE WILSON, Defendant in Error,

vs.

R. P. DENNIS, Plaintiff in Error.

Error to

County Court of

Coles County.

Opinion by Thompson, J.

This is an action in replevin begun July 2, 1915, by George Wilson, against R. P. Dennis, for the recovery of the possession of all the wheat and straw cut and standing in shock or bundle, and severed from the real estate and situated on the Robert Wilton seventy-six acre farm in Coles County, which plaintiff avers defendant wrongfully took and detains. The property was taken under the writ.

Defendant plead the general issue in replevin, and that the property described is the property of defendant and not of plaintiff on which issues were joined. A jury returned a verdict for plaintiff on which judgment was rendered. Defendant prosecutes this writ of error to review the judgment.

The material facts involved, briefly stated are the following: Robert Wilton owns a farm of seventy-six acres in Coles County which was rented under a written lease to George Wilson from March 1st, 1913. to March 1st, 1914. The rent agreed to be paid was \$105 due December 1, 1913, and one half the crops raised on the farm to be delivered in the nearest market. Robert Wilton was not in the State of Illinois, and had

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appointed George Rosebraugh his agent to rent the farm and collect the rents. Wilson occupied the farm from March 1, 1914, until some time in January, 1915, but there is no evidence in the record as to his rights there or under what terms he occupied the farm that year, further than that he owed some rent in January, 1914. Wilson testified that in the fall of 1914, he got ready to sow 25 acres of wheat, but before sowing it, he went and saw Rosebraugh and told him he was thinking of moving and asked him if he should sow some wheat and Rosebraugh told him to sow it. He did not tell, and the record does not show, what were the terms or under what agreement, if any, he sowed the wheat. In January, 1915, Wilton leased the whole farm to Dennis from March 1st, 1915 to March 1st, 1916. Before leasing the farm Dennis saw Wilson on the farm, and told him he had a chance to rent it. Wilson told Dennis about the wheat he had sown, and Dennis said if he rented the farm he would like to buy the wheat. Wilson testified that he told Dennis he wanted \$65 for the wheat: \$50 for his labor and \$15 for the seed and drill. Dennis testified that Wilson asked \$50 for the wheat, \$2 an acre, that

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Wilson said he owed Rosebraugh for rent and he would like Dennis to settle with Rosebraugh and Dennis testified that he told Wilson that, if he leased the farm, he would consider the trade for the wheat made, and would settle with Rosebraugh.

Wilson moved off the farm in January, 1915, and Dennis, after getting

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the lease, moved onto it. There were some further conversations between the parties in which Wilson agreed to take a note from Dennis signed by Rosebraugh, and Dennis was to leave the note with Rosebraugh. Dennis did leave a judgment note for \$50 on March 10, for Wilson with Rosebraugh. Wilson settled up his past due rent with Rosebraugh by a check on March 6, and Rosebraugh paid Wilson half the cost of the seed wheat. The note for Wilson signed by Dennis was neither signed by Rosebraugh nor accepted by Wilson. On May 1, Dennis tendered Wilson \$50 in cash in payment for the wheat; Wilson refused to accept the tender.

The parties disagree as what was the price fixed by Wilson for the wheat. He alone testified that it was \$65. Dennis and his son, who was present at the conversation, say \$50 was all he asked and two disinterested witnesses say Wilson told them he had sold the wheat for \$50. The very great preponderance of the evidence is that he sold it for \$50. Rosebraugh signed the replevin bond and apparently is assisting Wilson in this suit.

The fourth instruction tells the jury that if they believe from the evidence Dennis agreed to pay Wilson for the wheat on or before March 1, 1915, and that he did not pay within the time limited, then defendant cannot maintain his defense by proving that he tendered the consideration later. There is neither any evidence in the record that any time was

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fixed for the payment nor is there any evidence that the contract, if there was one, was that the title should not pass, if it was not paid for by a certain time. Wilson moved away surrendering the possession of the farm and wheat after a lease to the entire farm had been made to Dennis, and Dennis was given possession of the whole farm after a lease had been made to him, and Wilson had abandoned it and surrendered possession.

The sixth instruction given at the request of the defendant in error tells the jury that the defendant by his plea claims, that he was the owner of and entitled to the possession of the wheat, and that "the burden rests on the defendant to prove said facts and plea, by a preponderance of the evidence, before the defendant is entitled to receive a judgment in his favor, and unless the evidence preponderates in favor of the defendant as to the said plea, the finding and verdict of the jury should be in favor of the plaintiff Wilson."

"The allegation of property in the defendant is mere inducement to the formal traverse of right of property in the plaintiff. The question raised by a plea of property in the defendant is not whether the property

is in the defendant, but whether the right of property and the right to the immediate possession are in the plaintiff. Under such a plea the plaintiff must recover on the strength of his own title and

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the burden of proof is upon him to establish his right". **Pease vs. Ditto**, 189 Ill. 457; **Reynolds vs. McCormick**, 62 Ill. 412; **Constantine vs. Foster**, 57 Ill. 36; **Weimer vs. Temple**, 145 Ill. App. 498. The giving of this instruction was reversible error. The ninth instruction given for defendant in error is erroneous for the same reason.

The seventh instruction tells the jury that, if they believe both parties live in Coles County, thirty days would be a reasonable time in which to accept an offer for the sale of a crop of wheat growing in Coles county. The instruction is abstract in form. If there was no dispute over the facts, then what would be a reasonable time would be a question of law, but where the facts are in dispute or the motives of the parties enter into the question, then it becomes a question of fact for the jury to say what is a reasonable time to carry out a contract when the time is not fixed. **Morris vs. Wibaux**, 159 Ill. 627; **Butler vs. Wallbaum Stone Co.**, 47 Ill. App. 153. For the error in giving defendant in error's sixth and ninth instructions, the judgment is reversed and the cause remanded.

Reversed and Remanded.

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JOSEPH CECH, Appellee,

vs.

FIREMEN'S INSURANCE COMPANY, of
Newark, N. J., Appellant.

Appeal from

Sangamon

Opinion by Thompson, J.

This is an appeal by the fireman's Insurance Company of Newark, N. J. from a judgment for \$350 in favor of Joseph Cech.

Joseph Cech is a Polish miner who can neither read nor write the English language. He owned and lived in a house in Thayer, a small mining town of about 500 inhabitants in Sangamon County. Thayer is a mile and a half from Virden. H. C. Simons of Virden was the agent of the Delaware Fire Insurance Company and also of appellant. On September 27, 1910, the Delaware Fire Insurance Company through Simons, its agent, issued a fire insurance policy to Cech insuring for three years the dwelling in the amount of \$700 and the furniture therein to the amount of \$300.

On August 1, 1913, Cech rented a hotel or boarding house in Thayer, about two blocks from his dwelling and removed his furniture from his residence to the hotel. He also purchased some more furniture, and wishing to increase his insurance to \$500, on August 8, sent his wife and daughter, Mrs. Masco, to Virden to see Simons and have the policy changed as to the amount of insurance and location of the personal property.

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The testimony for appellee is, that when they arrived at Simon's office, he was out, but his clerk, E. F. Buckles was there. Mrs. Cech cannot talk English. Mrs. Masco told Buckles that her parents had moved from their residence to the hotel or boarding house, a short distance from their residence, and had bought some more furniture and wished the insurance on the furniture increased to \$500 and Buckles said it was all right. She asked Buckles if anything should happen to the furniture, if the policy was all right, and he replied it was all right that they need not be afraid. Buckles took the policy and struck out the figures \$300 with red ink and wrote above them \$500, he also wrote on the policy that the insurance on the furniture was increased to \$500, and signed the same "H. C. Simons agent". He also told them that he thought Mrs. Cech was too old to run a hotel. They paid at that time the additional premium required.

About September 2, the Simons agency sent Cech a postal card notifying him that his policy would expire September 27, and Cech again sent his wife and daughter to Simons office with the old policy and \$14.40.

the premium for a new policy. Simons, through Buckles, issued a new policy to Cech in the appellant company for three years from September 27, 1913. The new policy was issued insuring the furniture in the dwelling house, instead of in the boarding house, where it was located.

Afterwards on June 24, 1914, the boarding house and furniture were burned.

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Buckles admits that the additional premium was paid and that they told him they were going to keep boarders, but denies that they said anything about changing its location to the boarding house and says that it was Cech himself who paid for and got the new policy.

The declaration avers that the agent of the appellant had notice of the removal of the property insured from the dwelling house at the time he issued the policy sued upon and that the agent knew that the household goods were in the hotel or boarding house when he issued the policy. The only plea is the general issue.

The preponderance of the evidence shows that the agent of appellant knew at the time the policy, in force at the time the property was destroyed, was issued, that the household goods insured were being used in a hotel or boarding house, and that they were not in the residence insured. The location of the goods had been fully made known to the agent and the knowledge of the agent was knowledge of the company. The appellant cannot avoid liability because of the mistake of its agent in misdescribing the location of the property when its location was fully made known to him. **Phoenix Ins. Co. vs. Stocks**, 149 Ill 319; **Andes Ins. Co. vs. Fish**, 71 Ill. 620; **Phoenix Ins. Co. vs. Hart**, 149 Ill. 513; **Phoenix Ins. Co. vs. Whiteleather**, 34 Ill App. 60. It is also shown that after the loss the appellant sent an adjuster who made out proofs of loss for appellant.

Under the issues raised by the pleadings and the facts proven by the

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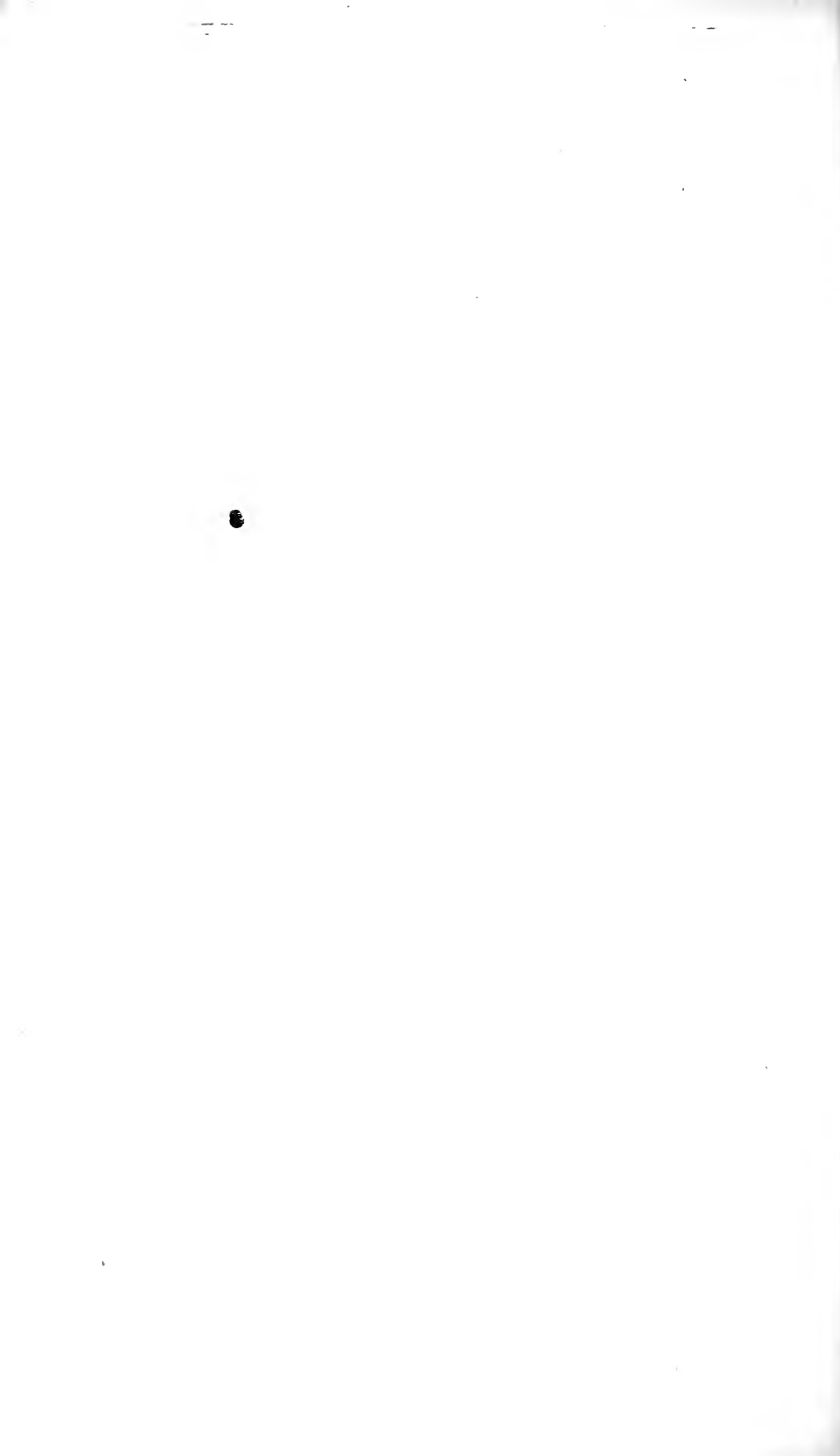
evidence introduced by appellee, we see no reason for disturbing the verdict and judgment.

The evidence concerning the changes in the policy issued by the Delaware Fire Insurance Company was incompetent, and the objection to such evidence should have been sustained, but what was said to the agent as to the location of the household goods was competent to show knowledge of such location when the policy sued upon was issued. The admission of the incompetent evidence was harmless error.

The judgment will be affirmed.

Affirmed.

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ELSIE BUCHAN,

vs.

COLLIN BUCHAN,

Appellee,

Appellant.

Appeal from

Champaign

Opinion by Thompson, J.

This is a bill in chancery filed in February, 1912, by Elsie Buchan against her husband Collin Buchan, for separate maintenance. The bill alleges that the parties were married in March, 1907, and that they lived together until May 7, 1911; that a child was born to them December 13, 1911, that complainant faithfully discharged her duties as such wife with kindness and forbearance and is now living separate and apart from her husband without fault on her part; that defendant was opposed to her giving birth to any child; that prior to the birth of the child on December 13, 1911, complainant became pregnant on two other occasions and the defendant maltreated her and produced and insisted that she take drugs to produce a miscarriage on each occasion; that miscarriages were so produced on said occasions; that he insisted that she should not give birth to the last child and again procured abortifacient drugs for her to take but she rebelled and refused to take them; that defendant is a man of violent passions and on many occasions addressed her with opprobrious and profane epithets; that he ill treated her and would not talk to her for a week at a time, when she was ~~enraged~~ except to direct what he wished done about the house; that he is stingy and miserly; that on May 7, 1911, he told her she must leave his home and never return and she left because of his orders and cruel treatment; that afterwards she offered to

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return and live with him if he would treat her right but he refused to take her back or to make any promise; that on another occasion she went to his home to effect a reconciliation but he told her that he never wanted to see her again; and that defendant has told complainant and others that he is not the father of her child born in December, 1911. It is alleged that the income of defendant is about \$4,000 per year.

The defendant answered the bill admitting the marriage but denying every other material allegation in the bill, and asserting that complainant became angry with him and left home because he objected to her associating with another man, M. E. Smith, thereby causing neighborhood gossip and that he had begged her to return but she had repeatedly refused.

The cause was referred to the master who reported the evidence with his conclusions, that the defendant is a frugal farmer who did not greatly enjoy social life; that complainant is a hardworking housewife

who greatly enjoys social life and dances; that they had frequent disputes as to their attendance at dances at Mahomet and that defendant reluctantly accompanied his wife to dances on numerous occasions and finally refused to accompany her; that on May 5, 1911, defendant decided to and did attend a dance at Mahomet without her husband; that on May 7, she returned home but her husband refused to allow her to remain; that on May 8, she went to her home to get her clothing and the defendant,

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asked her to remain but she refused; that the next day defendant went to see the complainant and asked her to live with him and she said she was willing to, provided she could have a horse to drive to and attend dances at Mahomet, and the defendant drove away without answering her offer; that previous to the separation the defendant had never accused his wife of having illicit relations with other men but did after the separation and birth of the child make such accusations; that on February 12, two days before the filing of the bill the complainant went to the house of the defendant in good faith and offered to return but he refused to permit her so to do; that "complainant is not wholly blameless in the separation" but was, at the time of the filing of the bill, "living separate and apart from her husband without legal fault on her part." The report further finds that defendant is possessed of certain property and that \$400 is a reasonable solicitor's fee to be allowed her. It makes no finding as to the value of defendant's property or an allowance for her but only that separate maintenance should be allowed by the court.

Objections were filed by the defendant to the report of the master, in that the master should have found the equities with the defendant, and enumerating certain charges against complainant, which it is insisted the master erred in not finding against her; that the master erred in finding that on February 12, 1912, the complainant in,

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good faith offered to return to defendant and that the master should have found she was living separate and apart from him because of her own fault.

The objections were overruled by the master in the trial court, by agreement of the parties, were considered as exceptions on the part of the defendant. The court overruled the exceptions and entered a decree giving her an allowance of \$20 per month and a solicitor's fee. The defendant appeals.

It is contended on behalf of appellee that the findings of fact by the master in matters referred to him are as conclusive upon the circuit court and this court as the verdict of a jury in a civil cause, and will be reviewed and set aside only for the same reasons that a verdict would be. In matters other than stating accounts the rule is, that the master's conclusions are simply advisory and only prima facie correct, and the court upon exceptions filed may modify or reject the report if it is

erroneous, defective or against the weight of the evidence. It is not the rule that the report of a master, other than the statement of an account, has the same force and is as binding on the chancellor and a court of review as a verdict of a jury. **Keuper vs. Mette**, 239 Ill. 593; **Larson vs. Glass**, 235 Ill. 584; **Bruggestradt vs. Ludwig**, 184 Ill. 24; **Ennesser vs. Hindek**, 169 Ill. 494. The opinion in the latter case contains a full review of the authorities on this question by Mr. Justice

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Cartwright.

The appellee did not except to the findings of the master that were in favor of appellant. By not excepting to the findings, the appellee admits that the defendant reluctantly accompanied his wife to dances at Mahomet on numerous occasions and that he finally refused to accompany her to any more dances; that on a certain Friday, on or about May 5, 1911, the appellee decided to attend a dance at Mahomet, and while the appellant was away, hitched up a team and departed to a dance at Mahomet, leaving a note for her husband, stating that she had gone to attend a dance, and that she did attend the dance leaving the team in the private barn of Smith, in the village of Mahomet; that the appellant about 9 o'clock that night went to Mahomet and drove the team home, a distance of eight miles; that appellee returned from the dance to the Smith home and stayed there that night, and learned the next morning that the team had been taken away in the night, and that on Sunday, she with the Smiths and others in an automobile, returned to her home and that appellant refused to receive her; that on the following Monday, appellee and her father went to appellant's home to get her clothing and appellant asked and offered in good faith to have her stay at home and she refused, and that on the following day appellant went to see her and asked her to live with him and she said she was willing provided she could have a horse and could attend dances at Mahomet; that previous to the separation ap-

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(pellant had never accused her of unchastity; that the appellee is not wholly blameless in the separation but at this time and at the time of filing the bill, she was and is living separate and apart from her husband without legal fault on her part.

The trial court approved these findings, which in short are, that when the separation occurred it was because of her fault, and that she had rejected the importunities of her husband to get her to return up to the time of filing the bill, but that by going and offering to return two days before the bill was filed she had repented of her actions and now is entitled to support.

The evidence shows that appellant is a farmer living eight miles from Mahomet, in Champaign County. There was nothing unusual in the early part of the married life of these parties. They had become

acquainted with M. E. Smith and his wife who lived in Mahomet. In 1910, Buchans gave a dance in a new building on appellant's farm to the neighbors and relatives. The Smiths were there and appellee and Smith went to the house of a near neighbor to borrow a lantern. They were gone so long that the guests made joking remarks about Smith and appellee, and when they did return appellant asked appellee what kept them so long, and she replied the lantern had to be filled and cleaned. Appellant from that time, objected to his wife associating with the Smiths,

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and such association appears to have been the subject of contention between them and of neighborhood gossip and scandal. The testimony tends to show that a sister of Mrs. Smith is notorious as a keeper of houses of prostitution in Champaign and Danville and appellant, learning of that fact, told his wife he did not want her to associate with Smith or Mrs. Smith because of what he had heard and of the neighborhood scandal. His wife had met Mrs. Smith's sister at the Smiths but she paid no attention to his request and continued her visits to the Smiths, on one occasion walking part of the way there after telephoning them to meet her. Smith was a frequent caller at the home of appellant, often in the absence of appellant. Appellant would not go to the Smiths and he became angry when they came to his home. On March 17, 1910, the anniversary of their wedding, there was a dance at Mahomet, to which appellant refused to go, but appellee went and stayed all night at the Smith's. A few days later she went to a dance with the hired man; this also made appellant angry. On May 5, Mrs. Smith came to appellant's home and, out of the hearing of appellant, invited appellee and the hired man to attend a dance at Mahomet that night. Appellee that day gave appellant as a reason for going to Mahomet, that she had to get some groceries; he gave her a check for \$25 to get the supplies and hitched up a team for her to go to the village. She had not said anything to appellant about going to the dance, but she went to Smiths and with them to it,

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When appellant came in from work that night, after getting supper for himself and the hired man and doing his chores, he went to Mahomet in search of his wife, and on going to Smiths found his team but no person there, and took the team home. He testified that he knew nothing about there being a dance that night, and that the next morning he found a note left by his wife stating that she was going to a dance and would not be home "until morning."

The appellee with the Smiths, Mrs. Smith's sister and a Mr. and Mrs. Hutchinson, relatives of Mrs. Smith, on the following Sunday went to her husband's home in a Ford automobile with suit cases to take away her clothing. Appellee and Mrs. Smith got out of the conveyance and went to the door of the house and asked for admission. There is a controversy as to what was said and who the conversation was between,



but the appellant would not let them into the house. The next day, she with her father returned to get her clothing and appellant asked her to come back and live with him, and her father also advised her to do so but she said she would never live with him again. Her father the next day told appellant that his wife was at Smiths, and would come back if he would go after her; he went after her that evening and asked her if she was ready to go home and she said she did not know, but she would come if she could have a team whenever she wanted one,

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and appellant said she could not have a team to go to Smiths, if she would stay away from there, there would not be any trouble. Her father —after telling his daughter what he thought of the Smiths, also advised her to go back where she belonged, and she replied, no, she was not going back there, she would not give up the Smiths.

It is clear from the evidence that appellee preferred the society of the Smiths who lived eight miles away from her house to the society and respect of her husband. It was in utter disregard of the rights of her husband and her own self respect that she would leave her home in May, while her husband and the hired man were planting corn, leaving them to get their own meals, while she attended a dance and remained all night with the Smiths, when she knew her husband objected to it and that there was gossip and scandal among her neighbors about her actions with the Smiths. She even had Mrs. Smith's sister with those clothes the Sunday after the separation on Friday. The master evidently properly found that the separation was because of her fault.

The original separation having been caused by her fault, the question then arises was she, at the time of filing the bill, without her fault, living separate and apart from her husband. She clearly was, unless her offer to return two days before the bill was filed was,

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made in good faith.

The evidence shows she had, just prior to making her offer, consulted attorneys, who had also been consulted by her father for her. She had evidently learned, that under the circumstances she could not sustain a suit for separate maintenance. Thereupon she and her father in the afternoon of February 12, 1912, two days before this suit was begun, went to a neighbor of her father and got two women, strangers to her husband, to go with her while she made, as stated by her, "a settlement with her husband", "she was going back to him". When they arrived at appellant's house they found appellant at work in a corn crib. He did not come out of the crib. Appellee did not get out of the surrey to have a quiet or private talk with him but talked to him in the crib from the surrey in which they drove there. It was eight miles to her husband's house. It was a chilly day in midwinter. She took no clothing with her except what she wore. A child had been born to these parties

December 13, 1911. She had left her child, less than two months old, at the home of her father. The offer she made, as testified to by her, was that she had decided to come back and live with him for his sake and the baby's sake. He said, I told you, in the presence of your father, you could come back if you would give up the Smiths and you said you would not give up the Smiths. She replied she "was willing to come back if he would do what was right", and he said she could not come back. She testified that she did not

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say what she meant by "what was right" but that it was to let her go wherever she wanted to, "to dances, to Smiths and to Mahomet", and agree to go with her or she was not coming back. Her construction of doing right was to give her permission to do the very things that had caused the separation.

When testifying she was asked if she was willing to go back and live with him, and her reply was she did not know, she would have to study over it.

We are of the opinion her offer to go back, made just before beginning this suit, was not made in good faith or with any intention of returning to the home of her husband to live there as a dutiful wife, but rather as was said in **Jenkins vs. Jenkins**, 194, Ill. 136, to procure evidence of a refusal on his part to furnish her a home as a foundation for her suit. A wife who had had trouble with her husband, and honestly desired a reconciliation, would not request that strangers should be present to witness their meeting and reconciliation, and hear their expressions of regret for, and forgiveness of their previous differences. Such matters are too sacred and confidential to be the object of public exhibitions.

It is not necessary to discuss the evidence concerning the use of drugs, the master did not find in her favor on that question.

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The decree is reversed with instructions to the trial court to dismiss the bill for want of equity for the reason that she is not without fault, living separate and apart from appellant.

Reversed and Remanded with directions.

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6460
GENERAL No. 6460.

OCTOBER TERM, 1915.

AGENDA No. 35.

GEORGE B. MASTON,

Appellees.

vs.

Appeal from
Vermilion.

J. C. ROSS,

Appellants.

Opinion by Thompson, J.

This is an appeal from a judgement for \$320 entered in the circuit court of Vermilion county in favor of George B. Maston, appellee, against J. C. Ross, appellant, in a suit in assumpsit to recover a commission for making the sale of 320 acres of land. The judgement appealed from was rendered on a second trial.

The suit was originally brought against J. C. Ross and Ellen Ross his wife. The declaration was against them jointly to recover a commission for the sale of land belonging to Ellen Ross. The first verdict was against the two defendants. There was no evidence on which to sustain the verdict against Ellen Ross.

The defendants moved for a new trial. The court granted a new trial as to Ellen Ross. Appellee then dismissed the suit as to Ellen Ross but did not amend the declaration. The court rendered judgement against J. C. Ross. An appeal was taken to this court and that judgement was reversed and the cause remanded on the ground that it was error to render judgement against one defendant in suit in assumpsit

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against two defendants without amending the declaration, when the suit had been dismissed as to one defendant because there was no evidence against her and not because of a personal defence such as infancy, bankruptcy or the like. **Maston vs. Ross**, 185 Ill. App. 57.

On the cause being reinstated in the circuit court the declaration was amended so that the suit was only against J. C. Ross.

The only contention of appellant is that the dismissal of the suit against Ellen Ross effected a discontinuance of the entire action and it is argued that such is the tenor of the former opinion in this cause. Appellant is mistaken as to the effect of that opinion. The action was discontinued against the joint defendants. When it was dismissed against Ellen Ross the appellee had a right to amend his declaration and state a cause of action against the remaining defendant. Sec. 39 of Practice Act. **Mayer vs. Brensinger**, 180 Ill. 110.

The expression in the opinion is that the wife was a necessary party according to the cause of action averred in the declaration.

There is no error in the case and the judgement is affirmed.

Affirmed.

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201-355

FRED MORRISON, Appellee,

vs.

J. ED. DAZY, W. J. ELZY, Appellées, and
FIRST NATIONAL BANK OF FINDLAY,
Appellant.

Appeal from

Shelby

Opinion by Thompson, J.

This is an appeal by the First National Bank of Findlay from a decree finding that the sum of \$2,535.35 is due to Fred Morrison on a note dated October 15, 1910, executed by W. J. Elzy. The note was secured by a chattel mortgage on some steers which were sold in Chicago. The net proceeds of the sale of the cattle amounting to \$3,797.91 were received by the First National Bank of Findlay. This is the second appeal of this cause to this court. The opinion in the former appeal is in 190 Ill. App. 374. It reversed and remanded the cause to the trial court, with instructions to state the account as to the amount due and unpaid on the note of October 15, 1910, and to render a decree for the balance due on that note to be paid by the First National Bank of Findlay out of the proceeds of the sale of the steers.

The only question presented for review is the finding of the amount due on the note, the appellant insisting that the note has been fully paid.

The evidence shows that Morrison lives at Ramsey, in Fayette county,

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and Elzy lives near Findlay in Moultrie county. On February 23, 1910, Elzy gave Morrison his note for \$2,000 due January 1, 1911, secured by a chattel mortgage on some horses and mules. The note on which the court found the amount due in this cause became due July 1, 1911. On December 29, 1910, Elzy had a sale of stock at which Morrison bought some mules and twelve or fifteen cows and bid on some steers. Elzy testified that what Morrison bought at that sale amounted to between \$2,600 and \$2,700. Morrison testified that the amount he bought at the sale was less than \$2,000, that he did not buy any steers but did by-bid on some for Elzy at his request, to prevent them from being sold at a sacrifice. He also testified that Elzy shipped the stock that he bought to him in a car; that he did not buy or get any steers; that what he bought was applied on the \$2,000 note which became due the third day after the sale; that Elzy transferred a sale note to him and gave him a check to pay the balance of that note and that he delivered that note and the mortgage securing it to Elzy at the time of the settlement for the purchases made by him at the sale.

The testimony of Elzy that the \$2,767.85 note, or substantially all of it, was paid by purchases made by Morrison at the sale of December 29, 1910, is denied by the testimony of Morrison. The evidence of Elzy



is shown to be unworthy of any credit by his acts and statements made out of court as well as contradictory statements in court. The following

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facts are not controverted. Elzy gave Dazey a note for \$1,555.55 on January 21, 1911, three weeks after the sale in December, and at that time gave Dazey a chattel mortgage on the steers covered by Morrison's mortgage and expressly made it "subject to a former mortgage given to Fred Morrison". That note and mortgage were renewed May 22, 1911, and again made subject to the Morrison mortgage. After the sale of the steers in Chicago, the appellant, of which Dazey was cashier, in the presence of Elzy, in the bank at Findlay, gave Morrison's attorney a check for \$910.14, that appellant claimed was the balance to Elzy's credit after it had charged up its notes against Elzy's account, to which it had credited the proceeds of the sale of the steers and withheld \$522, the amount of a garnishment proceeding begun by the bank of Gays. ^{Elzy} ~~Morrison~~, on the former trial of this case, testified that the note and mortgage had not been paid, "I never paid anything on it". When the steers were sold in Chicago, Elzy asked that the proceeds be sent to a bank at Sullivan, as he wanted to settle with Morrison. Elzy filed a schedule in bankruptcy, long after the sale of the cattle in Chicago, in which he listed as due to Morrison \$2,767.50 on a note secured by a chattel mortgage. The record also shows other facts and circumstances that impeach and discredit Elzy.

There are two witnesses who testified that Morrison said he was not by-bidding on the steers at the December sale, and that Morrison said his

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purchases were to be credited on the cattle note. These witnesses testified in 1915, to conversations that occurred in December, 1910, several years prior to the time they testified. Memory of language and testimony of the use of particular words after a long period of time should be received with caution because of the danger of misunderstanding or misrecollection of what was said, especially when the witness undertakes to give the precise words used. What they testified to might have occurred just as they remembered it and still, when the settlement for the purchases at the December sale was made between Elzy and Morrison, the purchases might have been applied on the \$2000 note as the great preponderance of the evidence shows they were applied.

The chancellor saw and heard the witnesses who testified in this cause. He had superior opportunities over this court, sitting as a court of review, for judging of their credibility and weighing their evidence. **Keyes vs. Kimmel**, 186 Ill. 109. The burden of proving payment was on appellant. We are of the opinion that the clear preponderance of the evidence shows that the \$910.22 was all that was ever paid on the note of October 15, 1910. There is no error in the decree and it is affirmed.

Affirmed.

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GENERAL No. 6472.

OCTOBER TERM 1915.

AGENDA No. 44.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,

vs.

HENRY ERMOVICH, Plaintiff in Error.

Error to the

County Court of

Christian

Opinion by Thompson, J.

In the county court of Christian county, Henry Ermovich was convicted under the first count of an indictment, charging him with the unlawful sale of intoxicating liquor in the town of Pana, while it was anti-saloon territory. He was sentenced to thirty days in jail and to pay a fine of \$100, and has sued out this writ of error to review that judgment.

The first assignment of error argued is that as it appears from the evidence, the town of Pana became anti-saloon territory through the votes of women, that the town of Pana never became local option territory. The Supreme Court, in *Scown vs. Czarnecki*, 264 Ill. 306, held that the provisions of the Woman's Suffrage Act of 1913, permitting women to vote on "all questions or propositions submitted to a vote of the electors of such municipalities or other political subdivisions of the State", covers every referendum election, and is valid so far as it applies to elections provided for by Statute alone, that are not mentioned in the Constitution. This question is not open for review. This court also decided against the contention of plaintiff in error in *People vs.*

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Canutta, (not yet published).

It is contended on behalf of the people that plaintiff in error was interested in the sales of intoxicating liquors which were made by the Continental Club, an incorporated society in the city of Pana. W. C. Profit, a constable, testified that the Continental Club did business at 28 or 30 Locust Street, and that it issued tickets and membership cards which had on them the name of plaintiff in error as president, and that they were sold and delivered to members by the secretary, W. L. Finefrock, and that the witness got beer in exchange for such tickets. He also testified that he never saw plaintiff in error in the rooms. None of the cards or tickets were produced in evidence and it does not appear whether the name of plaintiff in error was written or printed on them.

W. J. Finefrock testified that a man named Miki was president of the club and that plaintiff in error did not hold any position in the club that he knew of, and that he never saw him in the rooms of the club. No witness testified that plaintiff in error ever was at the club rooms, that he had any knowledge of, or connection with them, or that he knew his name was connected with the club rooms.

The plaintiff in error runs a grocery and meat market in Pana. The club rooms of the Continental Club are in the second story of a building north of the grocery store of plaintiff in error. The club rooms are reached by a stairway between the two buildings. The people introduced

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in evidence a certified copy of the record of special tax stamps of the 8th Illinois District, which shows that on July 9, 1914, stamp No. 47345 was issued to the Continental Club, Henry Ermovich, Pres., Wm. Stanley, Sec. Retail liquor dealer 16 So. Locust Street, Pana, Illinois, from July 1, 1914, with the certificate of J. L. Pickering, collector, that it was issued to the Continental Club as a retail liquor dealer at Pana. The record certified to by the collector was competent evidence, if the plaintiff in error was in any way connected with the management of the club rooms or had knowledge that his name was used in connection with their operation, but a careful examination of the record fails to disclose any evidence, that he had any knowledge, further than the inference to be drawn from the proximity of the club rooms to his place of business, and the fact that his name was on the membership cards and tickets. It was not necessary to prove that the State could not produce the original revenue tax stamp in order to entitle it to introduce evidence of the contents of public records, *People vs. Joyce*, 154 Ill. App. 13, and cases cited. If it had been necessary for the people to show that they could not produce the original stamp, before they could give secondary evidence concerning it, then such evidence should have been offered to the court out of the presence of the jury.

The people had issued and served on plaintiff in error a subpoena

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duces tecum, commanding him to produce at the trial "a certain internal revenue special tax stamp, or receipt issued to Continental Club, Henry Ermovich, Pres., Wm. Stanley, Sec. as retail liquor dealer, Pana, Illinois, from July 1, 1914, amount of tax \$25, July 9, 1914, No. 47345 of the date of 26th of April, 1915, J. L. Pickering, collector", and to appear and testify in this suit. This subpoena, with the return of the sheriff thereon, was offered and admitted in evidence on the part of the people over the objection of plaintiff in error. A notice, to produce the internal revenue special tax stamp described, was also served on the plaintiff in error, it also with proof of its service was offered and admitted in evidence over objection.

Article V of the Federal Constitution and Sec. 10 of Article II, of the Bill of Rights, in the State Constitution, provide: that no person shall be compelled in any criminal case to give evidence against himself. Section 426 of the Criminal Code provides: "No person shall be disqualified as a witness in any criminal case or proceeding by reason of his interest in the event of the same as a party or otherwise * * * provided how-

ever that a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect”.

The only object in introducing the subpoena and the return of ser-

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vice ni evidence and the notice to produce the revenue stamp before the jury was that the inference might be drawn that the plaintiff in error had such tax stamp. It in effect also brought to the attention of the jury the fact that he had a right to be a witness and had refused to do so. Such evidence in no way tended to prove the guilt of the plaintiff in error and was incompetent.

There is no evidence connecting plaintiff in error with this club, except the inference to be drawn from the facts that he was named as president in the revenue stamp issued to the club, and his name was on tickets and the membership cards as president. There is no evidence in the record upon which the judgment can be sustained.

There are some other questions argued which we do not deem it necessary to discuss at this time.

The judgment is reversed and the cause remanded.

Reversed and remanded.

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GEORGE J. GAY, Appellant.

vs.

EVELYN BOLAND, Appellee.

Appeal from

Vermilion

Opinion by Thompson, J.

Evelyn Boland brought this action in case against George J. Gay, to recover damages for personal injuries averred to have been sustained in consequence of the negligence of the defendant and his chauffeur.

The declaration contains three counts. The first avers that the defendant by his servant was operating a taxicab in the city of Danville and to and from adjoining villages for the transportation of passengers for hire; that at or near the village of Lyons, plaintiff became a passenger to the city of Danville for hire and that, while riding toward the city of Danville the servant of defendant, in charge of the taxicab, negligently operated the same at a high and dangerous rate of speed and lost control of it by reason whereof the taxicab was overturned and plaintiff injured. The negligence averred in the second count is that the steering rod of the taxicab was defective, in that it was loose, worn and out of repair. The third count charges general negligence.

The defendant filed the general issue and a plea denying that the operator of the taxicab was his servant. The case has been tried twice by a jury. The first trial resulted in a verdict in favor of the plain-

(Page 1)

tiff which was set aside by the court. At the last trial the jury returned a verdict in favor of the plaintiff for \$700. The defendant appeals from the judgment rendered on that verdict.

On the evening of July 25, the appellee in company with her sister, Mrs. Hutton, and an acquaintance, Mrs. Lemert, went on an interurban car from the city of Danville to the village of Lyons, which is five miles south of Danville. They there went to a dance hall, known as Keating's Road House. The appellant was the manager of the Aetna Hotel in Danville. He had an automobile or taxicab which he used for the purpose of transporting passengers for hire from his hotel to the depots, to various points in the city of Danville and to places outside the city. Grafton Small had been in the employ of appellant as chauffeur for several months prior to the accident. His employment was by the week and he was supposed to work twelve hours each day, beginning at two o'clock or after that time in the afternoon, and quitting at two o'clock or after in the early morning. When he was through his work he would make his report for the day, and pay the receipts to the hotel clerk and then return the

taxicab to the garage.

The appellee testified that about two o'clock on the morning of the 26th of July, she called the Aetna Hotel in Danville over the telephone, and ordered a taxicab for three passengers to come to Lyons; that in response to that call, the taxicab of appellant, with Small running it,

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came to Lyons; that she paid Small \$2 and with her two companions got into the taxicab which started towards Danville; that when near Danville, the taxicab was turned to the left side of the highway to pass a buggy going towards Lyons, and when it was turned back towards the travelled road, it skidded and turned completely around, turned over and injured her, breaking both her arms. She testified that the taxicab was going at the rate of 30 miles an hour.

Small testified that at the time of the accident the car was going at from 35 to 40 miles an hour. Appellant testified that he was the manager of the Aetna Hotel and at the time of the accident he was in St. Paul; that Small, the driver of the machine, was in his employ to drive the car and, that he was operating a taxicab line consisting of this car, transporting passengers for hire between the hotel and depots and between Lyons and Danville and other places; that the driver of the machine had authority to go to Lyons and back to carry passengers; that he authorized him to conduct the business in his absence; that the Aetna Hotel office was the office of the taxicab line; that a party wanting a taxicab would call the Aetna Hotel and whoever answered from the office had authority to take the call, and that Small had the right to collect fares.

The court gave the jury at the request of appellee the following instruction: "You are instructed that common carriers of persons for hire

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are required to do all that human care, vigilance and foresight can reasonably do, consistent with the character and mode of conveyance adopted and the practical prosecution of the business, to prevent accidents to passengers while being carried by them". The appellant insists that while this instruction announces the correct rule of law applicable to common carriers of passengers, that it does not announce the correct rule applicable to a carrier of passengers by a taxicab. It is argued that his taxicab business was a private business and that he was not as such a common carrier and that he was not required to use the same degree of care and vigilance that is required of a common carrier of passengers.

The appellant held himself out as a public carrier of passengers and it became his duty to carry all who applied for such service as far as practicable. "Those who carry passengers by means of stage coach, omnibus, steamboat or ferry are public carriers". Operators of elevators in buildings are also public carriers. 6 C. Y. C. 534; 5 Am. & Eng. Encyc. of Law 532; 2 Sherman & Redfield on Neg. Sec. 487; Tuller vs. Talbot, 23 Ill. 357; Parmelee vs. Wheelock, 224 Ill. 194; Harper vs. Fay Livery Co.,

264 Ill. 459; Johnson vs. Coey, 237 Ill. 89; Hartford Dep. Co. vs. Sollitt, 172 Ill. 222; Beidler vs. Branshaw, 200 Ill. 425; Benner Livery & Undertaking Co. vs. Busson, 58 Ill. App. 17; Western Union Tel. Co. vs. Woods, 88 Ill. App. 375; Field vs. French, 80 Ill. App. 78; Tread-

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well vs. Whittier, 5 L.

R. A. . 498. Carriers of passengers whether by railroad, stage coach, omnibus, hackney coach, hack, cab or elevator are public carriers and are required to use the same degree of care for the safety of their passengers. Carriers of passengers are required to do all that human care, vigilance and foresight can reasonably do in view of the character and mode of conveyance adopted and consistent with the practical operation of the means of transportation adopted to safely carry such passengers.

Defendant
Appellant also insists that the chauffeur of the taxicab was not acting within the scope of his employment and on his master's business at the time of the accident. *Appellant* admits that Small was employed by the week to run the machine in the night time, and that it was his duty to go where the business required. He also admits that when he left for St. Paul he authorized Small to go ahead with the business and that while his hours were from two o'clock in the afternoon to two o'clock in the morning, he some nights ran until three and at times up to four o'clock in the morning and that he would accept what was earned. The taxicab office was in the hotel and whoever answered the telephone calls in the hotel had authority to take the call. *Plaintiff* *Appellant* by telephone *did* call the hotel for the taxicab and the taxicab appears to have been sent in response to the call. Small stated he went with the machine to Lyons for a ride without being called by telephone and that he was

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about 2 A.M.
defendant. going to keep the fare collected and not pay it to *appellant*. If Small's story is true then he was not acting for appellant and although he was injured he could not have had any legitimate claim against appellant, yet he employed a lawyer to prosecute a claim and received \$100 by the hands of his attorney. *Small against the defendant*
~~It was a question for the jury whether he was acting for appellant in the line of his employment. Two juries have found that he was. The trial court has approved the finding. We cannot say the verdict and judgment are not sustained by the evidence. The judgment is affirmed.~~

Affirmed.

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for injuries he sustained at this time; no accident

PIONEER STOCK POWDER COMPANY,

Appellant.

vs.

CHARLES WASHBURN,

Appellee.

Appeal from

McLear

Opinion by Thompson, J.

On the first day of the February Term 1915, a judgment on a cognovit was entered against Charles Washburn in favor of the Pioneer Stock Powder Company for \$945.59 on a note dated January 20, 1914. The defendant entered a motion, to open up the judgment and for leave to plead, supported by an affidavit stating that the alleged note was a forgery. The motion was allowed and the defendant filed a verified plea denying the execution of the note. On a trial before a jury a verdict was returned in favor of the defendant. The plaintiff also submitted an interrogatory to be answered by the jury,—Did the defendant Charles Washburn sign the note in question in this case marked, Exhibit A? The jury answered "No," to the interrogatory. A motion for a new trial was overruled the judgment rendered in favor of the defendant. The plaintiff appeals.

The managers of the Pioneer Stock Powder Company, a corporation, were A. G. Liston, the president and M. A. Liston, his wife, the secretary and treasurer of the company.

The first contention of appellant is that the court admitted impro-

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per evidence offered by the appellee. He was permitted to testify, over the objections of appellant, to conversations and transactions with one Caton, without making preliminary proof that Caton was an agent of appellant at the time of the conversations between appellee and Caton and the transactions of other parties with Caton. When the objection was made counsel for appellee stated that they would show the agency whereupon the court overruled the objection. Appellee testified to driving Caton several days, in November, 1913, over territory in which he, Caton, was selling stock powder for appellant and his endeavors to induce appellee to work for appellant. The evidence offered by appellant showed that Caton was employed by it on January 18th, the day before it is claimed the note sued on was made. Appellee made no proof that showed that Caton was an agent of appellant before January 19th, or that his acts and conversations were known to or acquiesced in by appellant.

M. A. Liston, the secretary and treasurer of appellant, was called as a witness on its behalf, in rebuttal, and testified that Caton began working for the appellant on January 19th, 1914, and had never been in its em-

ploy before that time. On cross examination she admitted that Caton had been in the employ of appellant before January 19th, and that she could not tell how long; that she knew he had sold goods for appellant in the summer of 1913, up to August. She was then asked if the appellant did not ship stock powder to him in the fall. The witness

(Page 2)

answered, that she at no time made any shipment to him. She, as an executive officer of the appellant, knew whether goods had been shipped under his directions, and from her contradictory and equivocal answers, the inference can reasonably be drawn that he was the agent of appellant. The evidence offered by appellant tended to prove that Caton was an agent when the conversations and transactions proved occurred; it obviated the objection that the agency was not proved. There being evidence tending to prove that Caton was an agent, it became a question of fact for a jury to decide from all the evidence whether or not he was an agent of appellant.

This case was tried in May, 1915, before the present statute governing the admission of evidence concerning signatures took effect. A witness D. L. Fuller, a banker in Farmers City, with whom appellee does business, testified that the signature to the note in controversy is not the signature of appellee. On cross examination he was asked to and did compare the signature on the note with other admitted genuine signatures in the case, and distinguished them. He was then asked if he had ever seen the signature of appellee wherein he made a different "W" or "C" from those on the exhibits. He answered "not particularly different" that he had compared the signature on the note with signatures of appellee that he had in the bank. He was then asked if he had a signature anything like the signature on the plea. An objection was pro-

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perly sustained to this question for the reason that it was bringing into the case signatures that could not legally be submitted to the jury. The question called for matters that were immaterial and that would not shed any light on the issue being tried.

Appellee then offered to prove that the signatures at the bank were different from the signature to the oath attached to the plea. This was an offer to prove immaterial and incompetent matters and the objection was properly sustained.

It is also argued that the judgment is against the weight of the evidence. Appellant proved the signature by M. A. Liston, whose evidence on another question has already been referred to, and J. H. Kelly who testified that they saw appellee sign the note. Two other witnesses, bankers, testified that from a comparison of the contested signature with genuine signatures in the case, in their judgment the signature on the note is that of appellee. The appellee testified that the signature was not his, and four other witnesses testified that they knew his writing and

that it is not his signature. The jury and trial court had much better opportunities for testing the credibility of the witness than this court. The burden of proving the execution of the note by appellee was on appellant. The question in issue is one peculiarly within the province of a jury to decide. We are unable to say that the verdict is against the manifest weight of the evidence.

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It is also insisted that improper remarks were made by counsel for appellee in their argument. The remark complained of is that when a client goes to his lawyer he tells him the truth. There is no objection in the record to the remark. We fail to see how any prejudice or passion could be aroused by the remark. While it was outside the record it does not constitute reversible error.

Counsel for appellant in their statement of the case say there is error in giving appellee's third and in refusing appellant's second refused instruction, but in their argument do not refer to the instructions. General objections to the giving or refusing of instructions are not sufficient. It should be pointed out in what particulars the court erred. (**Sample vs. C. B. & Q. R. R.**, 233 Ill. 564.) We have examined the record and find no error in the rulings of the trial court on instructions. The jury were fully instructed on the issues and it would not serve any useful purpose to review the instructions. Finding no reversible error in the case the judgment is affirmed.

Affirmed.

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90-504

GENERAL No. 6490.

OCTOBER TERM 1915.

AGENDA No. 53.

JOHN PUGH, Appellee,

vs.

FRANK M. PALMER, Appellant.

Appeal from

DeWitt

Opinion by Thompson, J.

This is a suit in trover begun by John Pugh against Frank M. Palmer for the conversion by the defendant to his own use of a jersey cow which it is alleged was the property of the plaintiff. The plea is not guilty, under which are raised the issues of ownership and right of possession in plaintiff and the right of possession in the defendant. On a trial there was a verdict against the defendant for \$60 on which judgment was rendered. The defendant appeals.

The evidence shows that some time in 1910, appellee bought a black cow from appellant. On September 24, 1910, appellee was indebted to appellant in the sum of \$220 and gave him two judgment notes, one for \$100 due September 24, 1912, the other for \$120 due December 24, 1912; the notes were secured by a chattel mortgage given by appellee on the black cow and other stock. In December, 1912, appellee and appellant met at the latter's residence and had a settlement. Appellant is a lawyer; appellee can neither read nor write. Appellee claims that at the settlement there was a balance found due to appellant of \$17, and that appellant delivered
(Page 1)

up the \$120 note and agreed to endorse the other so it would show \$17 remaining unpaid. Appellant at that time wrote across the mortgage, "Paid in settlement December 25, 1912". Appellant claims there was a balance of \$100.55 found due him and unpaid. In March, 1912, appellee traded the black cow to appellant for the jersey cow in controversy.

Appellant testified that at the time they made a settlement, in December, 1912, he did not have a blank form of a note and that he changed the date of the \$100 note to December 25, 1912, the date of its maturity to December 25, 1913, and that appellee again signed it with his mark at that time, and that he took a chattel mortgage on the jersey cow, securing the \$100 note as re-executed. He produced a chattel mortgage purporting to be signed by appellee by his mark but which was not acknowledged. He testified that this chattel mortgage was executed by appellee at the time of the said settlement, and that it was under this chattel mortgage, that he took the jersey cow. Appellee testified that he did not sign either the note or the chattel mortgage. The court admitted in evidence both the note and the last chattel mortgage. If they were executed by appellee then they were valid between the parties and appellant had the

right to take the possession of the cow and appellee would not be entitled to recover in this suit. It was a question of fact for the jury to say whether they were executed by appellee as testified to by appellant.

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lant.

Appellee was asked, "If along about March 11, of this year you were the owner of the jersey cow, the property in question in this case?" An objection that the question called for a conclusion and that it was leading was overruled. He answered, "Yes, Sir". It was error to overrule the objection. It was leading and called for the conclusion of the witness. This error was however obviated by the answer to the next question which was, that he traded the black cow to appellant for her in March, two years before the time of the trial.

Appellant also offered in evidence a statement of the account as claimed by him at the time of the settlement. An objection was sustained to that statement. From the evidence of appellant it was made up by him from his books. It was not a statement made at the time of the settlement but was compiled from the original entries. The objection was properly sustained for that reason.

The objection was properly sustained for the further reason, that this is a suit in trover, and if the property was wrongfully converted, then set off cannot be pleaded or proved against the damages or value of the property taken. (**Kraggy vs. Hite**, 12 Ill. 99; **Kellogg vs. Holly**, 29 Ill. 437; **Schwitters vs. Springer**, 236 Ill. 271), hence the condition of the accounts between the parties was

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immaterial further than to show that appellant claimed to have a note made by appellee, which was in whole or in part unpaid, and secured by a chattel mortgage on the jersey cow, and under which he claimed to have taken possession of the cow. The accounts between the parties had no connection with appellee's ownership or trade for the cow in controversy.

Appellant also insists that the appellee should have brought the suit in some form of action wherein their mutual accounts could have been tried. It was the privilege of appellee to elect what kind of a suit he should bring. He had the right to bring it in tort or to have waived the tort and sue in assumpsit. It is not a legal cause of complaint, that appellee has brought the suit in that form of action which does not permit appellant, a wrong doer, to urge as a set off or to recoup an indebtedness that may be due from the owner to himself not connected with the illegal transaction. **Hubbard vs. Rogers**, 64 Ill. 434. The court instructed the jury, at the request of appellant, that a chattel mortgage, that is signed by the mortgagor, is good between the parties and that it is not necessary to its validity, that it be either acknowledged or recorded.

Appellant also insists that at the time of the trade of the black

cow for the jersey cow, there was an agreement that the appellee should give a mortgage on the jersey and that it not having been given, he had

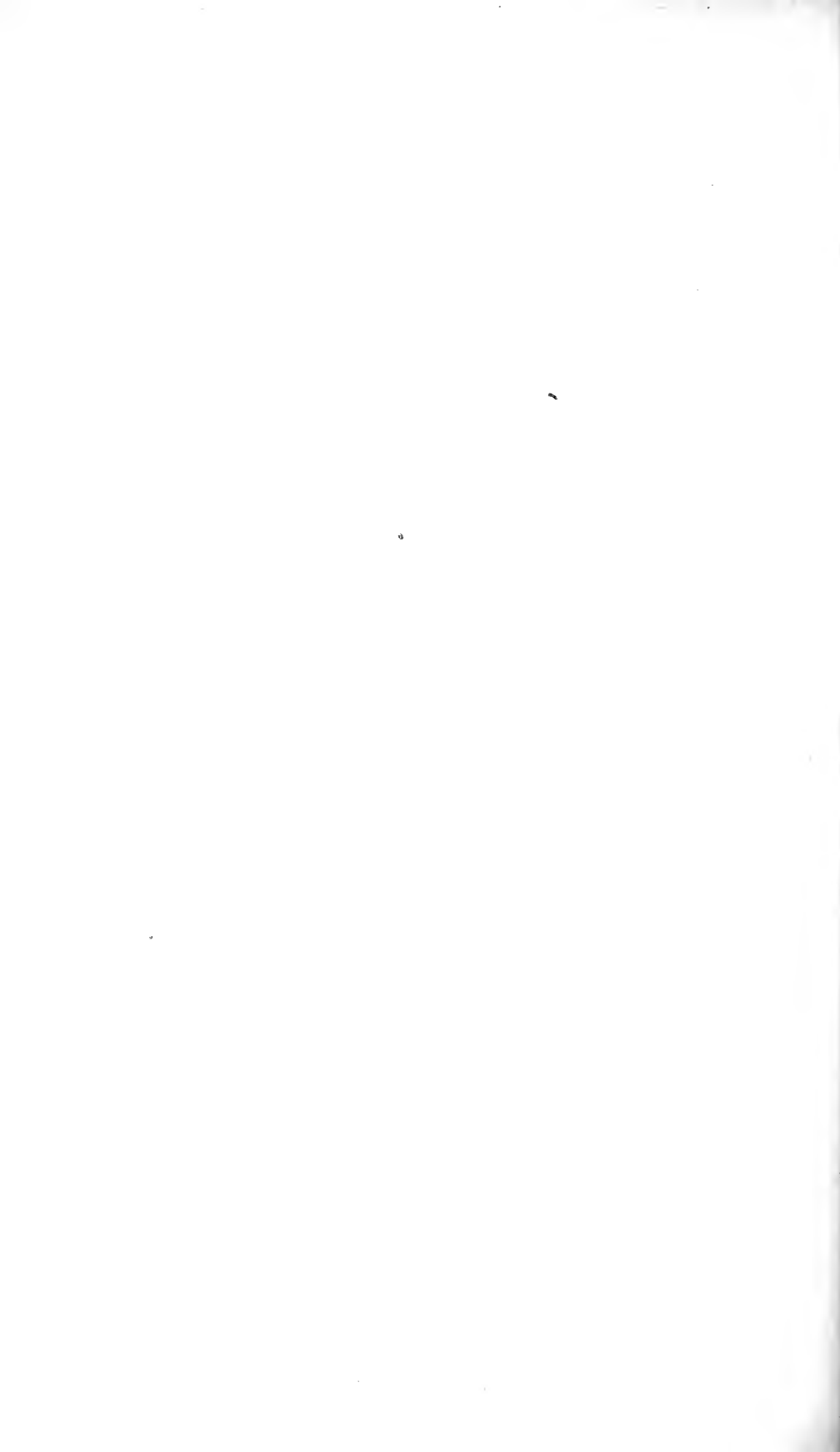
(Page 4)

the right to rescind the trade more than two years after it was made and take possession of the jersey. To do that he must return the black cow. There is no pretense that he offered to return the black cow; his intention was to retain both of them.

The jury, by their verdict, found that appellee did not execute either the note or mortgage dated December 25, 1912, and the verdict and judgment are sustained by the evidence. The judgment is affirmed.

Affirmed.

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NELS SUNNES,

Appellee,

Appeal from

vs.

Ford.

ILLINOIS CENTRAL RAILROAD CO.,

Appellant.

Opinion by Thompson, J.

Nels Sunnes brought suit in June, 1914, against the Illinois Central Railroad Company to recover damages sustained by plaintiff to his person and to an automobile in which he was riding on July 13, 1913, in a collision between his automobile and a freight train of the defendant at a public road crossing. The declaration contains four counts and avers general negligence, failure to give the statutory signals, running at a high and dangerous speed and permitting grass, weeds and hedge on its right of way to obstruct the view of travelers on the highway. A jury returned a verdict in favor of plaintiff for \$700 on which judgment was rendered and from which the defendant appeals.

[The evidence shows that appellee at the time of the injury was 50 years of age. His occupation had been a thresher, but for about four years he had been selling automobiles. At the place where the accident occurred the railroad runs east and west. The public highway crosses the railroad at right angles. The right of way east of the highway is eight rods wide and there is 64 feet of the right of way on the south side of the track. The track is straight for half a mile east of the highway,

(Page 1)

and runs on an embankment immediately east of the highway, and the greater part of that distance, about ten feet above the surrounding country.

The public highway is about four rods wide with the traveled road in the center of it. There is a hedge fence on the east side of the highway for about a quarter of a mile south of ^{defendant's} ~~appellee's~~ right of way up to within about 80 feet of the south side of the right of way, then there is a clear space, except for a board fence ^{for} of 34 feet, then a hedge for 47 feet extending to the south side of the right of way, and evidence tending to show it extends fifteen feet on the right of way and evidence that there is no hedge on the right of way, then a board fence about 50 feet up to the cattle guard under the track. The hedge south of the clear space of 34 feet had been cut down to about 4 1-2 feet and had a years growth above that, making the hedge between 7 and 8 feet high. That part of the hedge between the clear space and the right of way had not been cut and was higher than the other. The highway south of the track had an up grade of ten feet towards the railroad in the last 200 feet south of the

track of which 6 1-2 feet was in the 100 feet from the track; the embankment on the highway leading up to the crossing was about 17 feet wide where it joins the railroad embankment. The fence on the south side of the right of way is an ordinary wire fence. There was a large crossing sign at the intersection, that was plainly visible for a quarter of a mile down the road from the intersection.

(Page 2)

Plaintiff
Appellee testified that at about five o'clock in the afternoon of the day of the accident, he, in a Marmon automobile in good order, that he had used since the previous October, came north on the road that has been described; that the road was "awful rough" having deep cuts in it made by wheels of vehicles and by horses; that he drove his car at the rate of 20 miles an hour; and that as he came along the road about 40 rods from the railroad he looked to see if a train was coming until he was satisfied there was none, but that the hedge was so high and thick that he could not see over or through it. He further testified that he did not see the break in the hedge and did not know of it until after the accident; that about 50 feet from the track he cut off the gasoline intending that the speed of the machine would carry it up over the grade and across the track; that he did not see the train until he was within 20 or 30 feet of the track and that he did not apply either the foot or hand break but near the train turned toward the west. The evidence shows^d that the automobile hit the engine between the pilot and the cylinder head and that the train was a freight running at about 25 miles an hour.

The burden was on the appellee, to prove that he was in the exercise of ordinary care for his own safety as he approached the railroad crossing, and unless he has shown that he was in the exercise of ordinary care in approaching the crossing, the judgment cannot be sustained. His

(Page 3)

admission that he knew of the crossing and that he ran the automobile at from 18 to 20 miles an hour over a very rough road, up to within 50 feet of the crossing that was in plain sight and of which he was aware, by the side of a hedge that he could not see over, although he testified he looked until he was satisfied no train was coming, is an admission of facts which show a want of ordinary care amounting to gross negligence ✓ on his part, without considering his statement that he did not use either break, with which the automobile was equiped, to stop his machine after he saw the train. His statement that he was looking for a train, cannot be true for he would have seen the board fence at the gap in the hedge, and he also would have seen the train through such gap and as soon as he was within 50 feet of the track, if he had been looking as he testified. He was a reckless operator of an automobile. On another occasion he admits having collided with an automobile standing in the street in Gibson City and at still another time he ran into a telephone box and pole. The fact that the view of the railroad track was partially obstructed by the ✓

hedge required care on his part proportionate to the known danger.

The undisputed facts in connection with the evidence of the appellee show clearly, that he was not in the exercise of ordinary care in approaching the railroad where he was injured. The judgment will be reversed with a finding of fact. It is not necessary to review the other ques-

(Page 4)

tions argued.

Judgement reversed.

Finding of fact to be incorporated in the judgment. The appellee was not in the exercise of ordinary care at the time he was injured.

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Gen. No. 6572.

April Term, 1918.

C. Cl.

Milton E. and Samuel E. Livingston,

Plaintiffs,

vs.

Harry J. Grey,

Defendant.

Appeal from McLean County.

Opinion by Thompson, J.

This is an action for forcible detainer begun before a Justice of the Peace, May 3, 1918, by Milton E. Livingston and Samuel E. Livingston against Harry J. Grey to obtain possession of certain described real estate in the city of Bloomington. The Justice rendered a judgment in favor of the plaintiff. The defendant appealed to the Circuit Court. On a trial in that court, before a jury, an instruction directing a verdict in favor of the plaintiffs was given at the close of ^{all} the evidence; judgment was rendered in favor of the plaintiffs, and the defendant prosecutes this appeal.

[The evidence shows that on May 1, 1905, the defendant leased the described premises for the term of five years from Anna B. and William H. Brown at a rental of \$145.00 per month, payable monthly in advance on the first day of each month. The lease contains a provision for an extension for a like term, upon the same terms and conditions, upon a written notice being given by the lessee on or before March 1, 1910.

On March 3, 1910, an extension of the lease for five years, from May 1, 1910 was executed by the parties. There was no further extension of the lease. On June 1, 1914, William H. Brown, who had become sole owner of the premises, made a lease of the premises to ^{plaintiffs} ~~appellees~~, at \$225.00 per month, to begin May 1, 1915,

the day that the extension of ~~appellant's~~^{appellant's} lease expired.

Mrs. Brown was the mother of William H. Brown; she died June 11, 1914; The contention of ~~appellant~~^{appellee} is that in a conversation with him, Mrs. Brown told him that he might continue in possession of the premises after the expiration of his extension, as long as she lived, and that the suit should have been brought in the name of William H. Brown, the present owner, and not by his lessees. The court sustained an objection to the offer made by ~~appellant~~^{appellee} to prove the conversation between Mrs. Brown and himself, waiving the requirement of notice in writing by the lessee.] The objection was properly sustained because, (1) the terms of the instrument under seal could not be varied by parol, and (2), the terms of the lease gave the right to only one extension and that required a notice thereof in writing before March 1st., preceeding the expiration of the lease. The further reason might be stated that appellant did not claim that Mrs. Brown promised that he might have an extension beyond her life time, and she died before the lease expired.

The lessee from a lessor, whose term is to commence at the expiration of the term of a prior lessee, is the proper and only party who can maintain a suit to obtain possession of devised premises from the prior lessee. *Thomason vs. Wilson*, 146 Ill. 384; *Grand Union Tea Company vs. Hanna*, 104 Ill. App. 570; *Floersheim vs. Baude*, 110 Ill. App. 536. The evidence clearly proved the appellees' right to the possession and there being no evidence tending to show that appellant was entitled to hold the possession, a peremptory instruction to find in favor of appellees was properly given, *Levinia Co. vs. Strobel*, 193 Ill. App. 379.

Counsel for appellant also state in explanation of this appeal that appellees obtained their lease for the premises without notice to appellant, and the fact that other premises in as good a location

for his business are not available, left him no course "except to hold the fort" until he can find another suitable location. Such defiance of legal rights can not be justified in the State of Illinois.

There is no error in the case and the judgment is affirmed.

affirmed.

2035

General Number 6571. April Term, A.D. 1916. Agenda Number 60.

J.H. Birch,

Appellee,

v.

John F. Denton, Tax Collector, etc.,
and S.D. Burton, County Collector, etc.,
Appellants.

) Appeal from

) Polk County

) Circuit Court.

Per Curiam.

The facts material to the determination of the questions presented by this appeal are identical with those in the case of J.E. Patterson against these same defendants, the opinion in which case is filed simultaneously with this one, and is reported in -- Ill. App. --- .

and that is said in that opinion is controlling in this case.

For the reasons that are there given for dismissing that appeal, this appeal is dismissed.

Appeal dismissed.

GENERAL No. 6474.

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~~APRIL~~ TERM ~~1915~~

AGENDA No. 4.

HENRY McDERMOTT,

Appellee,

vs.

Appeal from Macon.

REX ELECTRIC COMPANY,

Appellant.

Opinion by Thompson, P. J.

Appellee began this suit against appellant and two other parties to recover damages for personal injuries averred to have been sustained by appellee because of the negligence of appellant and two other defendants. The suit, after several amendments to the declaration was dismissed as to all defendants except appellant. The case was tried on two amended counts of the declaration. The first, after averring the duty of appellee, avers that appellant negligently, carelessly and willfully did a certain act whereby appellee, while in the exercise of ordinary care for his own safety, was injured. The second count avers that the act of appellant because of which appellee was injured was simple negligence. A plea of the general issue was filed on which issue was joined. A jury returned a verdict in favor of appellee for \$500 on which judgment was rendered.

The evidence shows that Grindal & Son, who were the defendants that were dismissed out of the case, had a contract for the erection of a building. Appellant was a subcontractor doing the electric wiring of the building. Appellee was a subcontractor doing some calcimining. Both these subcontractors were at work on the same floor of the building.

disputed (Page 1)
The employees of appellant were working with a three-quarter inch conduit pipe in which was an elbow. Appellee had occasion to pass over this pipe, while it was lying on the floor near a door. One of appellant's employees, in raising part of the pipe up to another employee, who was standing on a ladder, raised the elbow in the pipe from the floor just as appellee was stepping over it and thereby tripped appellee, causing him to fall and injure his knee on the floor, which was made of concrete.

The first contention of appellant is that a judgment cannot be sustained on the first count, because it alleges that the negligence was willful. The proof does not tend to show that the act of appellant was willful. "In tort the plaintiff may prove a part of his charge, if the averment is divisible, and proof of a part of the allegations is sufficient to sustain a case will sustain a judgment." "Proof of mere negligence is sufficient through the declaration charges willfulness." *Guianios vs. De Camp Coal Co.* 242 Ill. 278; *Ehrlich vs. Chicago Great Western R. R. Co.*, 160 Ill. App. 379.

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A subcontractor owes to the employees of another subcontractor, at work on the same building using reasonable care for their own safety, the duty of using reasonable care to avoid injuring them. O'Rourke vs. Sproul, 241 Ill. 576.

Appellant insists that the judgment is not sustained by the evidence. There is evidence in the case tending to prove negligence on the part of

(Page 2)

the employees of appellant. The questions of negligence on the part of appellant and due care on the part of appellee were peculiarly within the province of the jury. They were questions upon which reasonable men might disagree, when all the evidence in this case is considered. The trial court having approved of the verdict, no sufficient reason is shown why this court should interfere with the judgment.

It is also contended that the court erred in refusing to give two instructions requested by appellant. The first of these was properly refused because it was argumentative. The second was properly refused because it assumed that the appellee was negligent and seeks to revive the antiquated doctrine of comparative negligence which is not now in force in this state. A review of the record shows that the jury were fully instructed on every legal proposition in the case and that appellant has no reasonable cause of complaint in the refusal of instructions requested by it. There is no error in any of the matters presented for review. The judgment is affirmed.

Affirmed.

(Page 3)

M. E. GROVE,

Plaintiff in Error,

vs.

Error to Macoupin.

JOHN LINK and CHARLES MEINER,

Defendants in Error.

Opinion by Thompson, P. J.

This is an action in case begun by M. E. Grove against John Link and Charles Meiner to recover damages for injury to her means of support under Section 9 of the Dram-Shop Act. A jury returned a verdict in favor of the defendants on which judgment was rendered. Plaintiff has sued out a writ of error.

[The declaration avers ^{seel} in substance, that the defendants, who were keepers of dram shops, sold intoxicating liquor to ^{plaintiff's} her husband from February 1, 1908 until the beginning of this suit in February, 1912, causing him to become habitually intoxicated, and as a result of such intoxication he squandered his money, wasted his time, neglected his business and failed to support plaintiff and in consequence of such intoxication plaintiff was made to suffer for the necessities of life.

The evidence shows ^{seel} that the Groves were married in 1873, that the husband has followed various vocations, among others that of a clerk, a laborer, a constable, a dealer in poultry, and a keeper of a restaurant, but has never accumulated much of this world's goods. In 1908 he borrowed \$500 and bought a small restaurant in Carlinville.

(Page 1)

He ^{seel} has for many years been in the habit of using intoxicating liquor, appears ^{seel} to have used it to greater excess from 1909 to 1912. In 1911, plaintiff caused written notices to be served on the defendants forbidding them to sell intoxicating liquor to her husband. The defendants admit that after the service of these notices they continued to furnish her husband with liquors. The evidence tends ^{seel} to show that the husband because of constant intoxication became a nervous and physical wreck, so that for a year he was unable to do anything, and while intoxicated he sold his restaurant for \$25.00.

The evidence also tends ^{seel} to show that for the last two years that the husband was running his restaurant, he spent in the saloons of defendants an average of about 90 cents per day. The defendants ^{seel} do not deny that they frequently sold liquor to the husband of plaintiff, but they ^{seel} say he was a shiftless, good-for-nothing person at the best, and never furnished his wife a good living and therefore she was not injured in her means of support by their sales of liquor to him, which caused him to become intoxicated. The great preponderance of the evidence shows ^{seel} that the

husband of plaintiff got liquor almost daily at the saloons of defendants and was frequently intoxicated to such an extent that he could not attend to his business.]

If the income of the husband, that should have been applied to the support of himself and his wife, was reduced and used in the purchase of intoxicating liquors which caused his intoxication then she thereby sus-

(Page 2)

tained an injury to her means of support, and the question whether her means of support were suitable to her condition in life is immaterial. Jefferies vs. Alexander, 266 Ill. 49; McMahon vs. Sankey, 133 Ill. 636. Brown vs. Mondy et al. (opinion of 4th District filed April 17th, 1916.) not published. His ability to furnish her with the comforts of life was lessened or destroyed although she may in some way have obtained the bare necessities of life. The verdict and judgment in this case are against the preponderance of the evidence.

[The ^{eleventh} ~~fifth~~ instruction ^{were} given at the request of the defendants: "The court instructs the jury that you should not permit yourselves to be to any extent influenced or prejudiced against the defendants because or on account of the fact, if the evidence shows such fact, that they were engaged in running and keeping saloons." This instruction should not have been given for the reason the evidence showed and defendants admitted that they were running saloons and it was one of the averments of the declaration that they were dramshop keepers and as such had sold liquor to plaintiff's husband. It was a material averment of the declaration that they were keepers of dram shops and the jury had the right and it was their duty to consider that evidence, which appellants admitted to be true.

[The ~~eleventh~~ instruction given for the defendants: "The court instructs the jury that if you believe from the evidence in this case that the husband of plaintiff, during the period of time covered by the declaration, was not an habitual drunkard you should find the defendants

(Page 3)

not guilty." There are two reasons why this instruction is erroneous. This is a suit in case. In tort the plaintiff may prove a part of the charge if the averment is divisible, and proof of a part of the allegations, if sufficient to sustain a case, will be sufficient to sustain a recovery. Proof that as a result of intoxication caused by defendants, the husband squandered his money and that plaintiff was thereby injured in her means of support would be sufficient to sustain a verdict for plaintiff. Guanois vs. DeCamp Coal Co., 242 Ill. 278 and cases cited. The instruction in effect told the jury, that unless they believed from the evidence, that the husband was an habitual drunkard during all the time covered by the declaration a verdict must be returned in favor of the defendants. [The ^{eleventh} ~~thirteenth~~ instruction is argumentative and also told the jury, that if they believed that the husband failed and omitted to attend to his business and by reason thereof plaintiff was injured in her

means of support, yet if the jury "believe from the evidence that such failure and omission to properly attend to his business or such inability to properly attend to his business was for other reasons than that of habitual intoxication then the jury should find the defendants not guilty." Under the declaration if by reason of the intoxication of the husband he did not attend to his business and she was injured thereby in her means of support, she was entitled to recover.

~~The fourteenth instruction given for defendant is:--~~ "The court instructs the jury that in this case the plaintiff claims that she has

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been injured by sales of intoxicating liquor made to her husband by the defendants, which materially assisted in causing him to be and become habitually intoxicated. You are further instructed that even though you should believe from the evidence that the defendants did sell to the husband of the plaintiff intoxicating liquors during the period covered by the declaration, and that such intoxicating liquors materially assisted in causing the husband of the plaintiff to be and become habitually intoxicated; yet if the jury further believe from the evidence that during all the time the husband of the plaintiff maintained and supported her, according to their station, situation and condition in life, then in that state of the proof, if the proof so shows, you should return a verdict finding the defendants not guilty."

If the husband was receiving an income, which should be applied to the support of himself and his wife, and this income through his intoxication caused by defendants "was reduced and not applied to their support, then there was an injury to her means of support, and the question, whether her means of support were suitable to her condition in life is immaterial." *Jefferies vs. Alexander, Supra*. This instruction was erroneous.

For the errors pointed out the judgment is reversed and the cause remanded.

Reversed and Remanded.

(Page 5)

THE COLUMBIA GRAPHOPHONE CO.,

Plaintiff in Error,

vs.

Error to McLean.

FRED W. NIERGARTH and J. R. BROWN
Partners, as The Brown Piano Co.,

Defendant in Error

Opinion by Thompson, P. J.

The Columbia Graphophone Company began this suit in assumpsit against Fred W. Niergarth, trading under the name and style of the Brown Piano Company, to recover \$371.90 a balance claimed to be due the plaintiff from Niergarth for goods sold to the Brown Piano Company. Counsel for both sides state that on the trial the pleadings were amended by making J. R. Brown a party defendant, so that the suit is prosecuted against Fred W. Niergarth and J. R. Brown partners under the name and style of the Brown Piano Company. The record does not show any amendment of the pleadings or leave to amend but apparently all the pleadings of the plaintiff, except the precipe, were changed without any formal order or refileing. A jury returned a verdict in favor of the defendant Niergarth, on which judgment was rendered. The plaintiff has sued out a writ of error to review that judgment.

[The proof shows that previous to November, 1912, J. R. Brown, under the name and style of the "Brown Piano Co." had been engaged in selling pianos in a building owned by Niergarth. In November, 1912, Brown and Niergarth made an agreement by which Niergarth was to assist Brown in a side line known as the Graphophone department.

(Page 1)
Niergarth
On November 19, 1912, ~~defendant in error~~ wrote to the plaintiff in ~~error~~, that he and Brown were equally responsible for the goods that might be purchased. "It is understood however, that all orders placed will bear the O. K. or signature of Mr. F. W. Niergarth." On October 3, 1913, ~~defendant in error~~ again wrote to plaintiff in ~~error~~, "Kindly ship goods ordered by Brown Piano Company per J. C. Brown until further notice." On November 5, 1913, ~~defendant in error~~ again wrote to the plaintiff in ~~error~~. "Do not ship any more orders to Brown Piano Company unless signed by me, thereby countermanding my order of October 3rd, 1913." Letters, written by plaintiff in ~~error~~, clearly show that the plaintiff in error regarded defendant in error, only as a guarantor of goods bought by the Brown Piano Company, and the statement of plaintiff in error shows that after the letter of November 5, 1913, was received, the plaintiff in error shipped nearly \$600 of goods on the order of Brown without any approval or direction from defendant in error.

There is no error either in giving or refusing instructions. The verdict and judgment are fully sustained by the evidence. There being no error in the case the judgment is affirmed.

Affirmed.

NORA EDWARDS,

Appellant,

vs.

Appeal from Clark.

RUTH PRUST,

Appellee,

Opinion by Thompson, P. J.

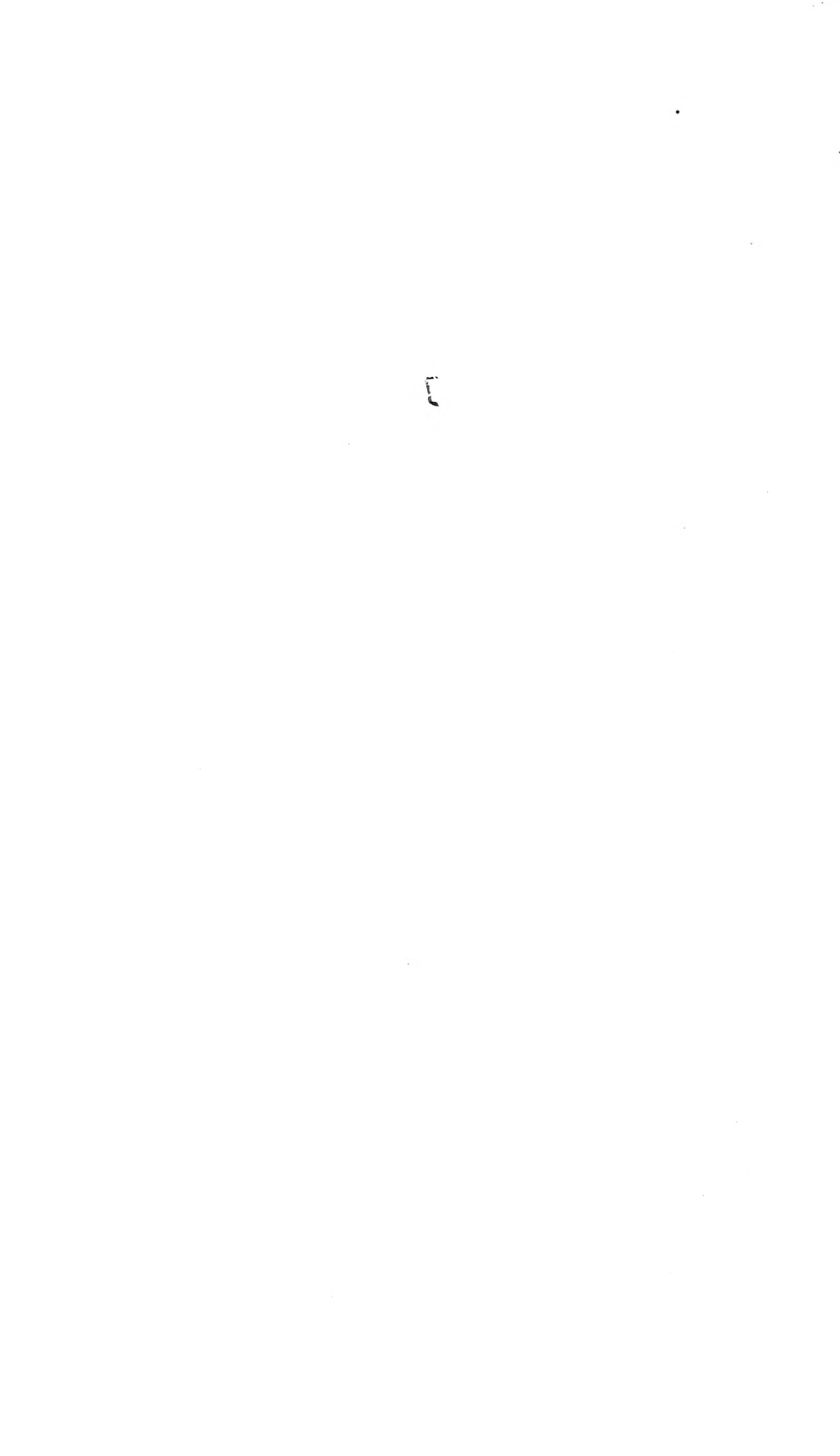
Nora Edwards, plaintiff began this suit against Ruth Prust before a justice of the peace, to recover damages for an injury to a horse loaned to the defendant. A judgment was rendered in favor of the plaintiff on a verdict of a jury by the justice. The defendant took an appeal to the circuit court, where a jury returned a verdict in favor of the defendant, on which judgment was rendered. The plaintiff appeals.

~~The plaintiff, with her sons Clayborn and Harry live on a farm two and a half miles north of West Union in Clark county. She owned a family driving horse named "Four Step." Ruth Prust, a niece of appellant, lives about 80 rods south of her aunt. Two neighbor girls, Nannie and Mabel Brown, also live south of appellant. All were on very friendly terms prior to the event which caused this law suit. On February 26, 1915, appellee went to appellant's to borrow Four Step, to go to west Union to pay some lodge dues for her mother. Appellant was not at home, but her son Clayborn saddled Four Step for appellee and she rode the horse away. She rode to the Brown home but the girls were visiting two miles south of West Union. She went to find them and met them.~~

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~~south of West Union. On the way home she paid her mother's dues. The girls then returned to the home of the Browns, Mabel riding on Four Step with appellee. After arriving at the Brown home, the Brown girls both got on Four Step and appellee rode a horse of the Browns. They all went to Walnut Prairie about two miles north of West Union, where they met Clayborn Edwards. Mabel dismounted to walk with Edwards, who adjusted the riding blanket on Four Step for Nannie. There is some conflict in the evidence as to the part, if any, Clayborn Edwards took in the girls exchanging horses. The two girls, appellee on the Brown horse and Nannie on Four Step, rode back to West Union on the suggestion of appellee to get a crochet needle. While turning a corner at a running lope Four Step slipped on a concrete crossing, falling and crushing his knee. The horse was a valuable one but is now comparatively worthless.~~

There is no pretense that appellee was to pay any compensation for the loan of Four Step. She was a gratuitous bailee of the horse. The first instruction given at the request of the defendant is: The court in-



structs the jury that if you believe from the evidence in this case that the horse in question was loaned to the defendant by Clayborn Edwards, the son of the

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plaintiff, and while said horse was in possession of the said defendant was injured, then you are instructed to find for the defendant herein, unless you further believe from the evidence, that she was guilty of gross carelessness or negligence in the care which she took of said horse while she held possession thereof." When abailment is for the sole benefit of the bailee, the bailee is required to use extraordinary care over the thing bailed and is responsible for slight neglect. When the gratuitous loan of the horse was shown and that the horse was then sound, and was returned in an injured condition, it devolved on appellee to show that she had exercised the degree of care required by the nature of the bailment. *Bennett vs. O'Brein*, 37 Ill. 250; *Hagebauch vs. Ragland*, 78 Ill. 40; 3 R. C. L. 103; 3 Eng. & Am. Encyc of Law 746. The horse having been injured before it was returned to appellant, the law presumes negligence on the part of appellee and the burden was on her to show that she used the highest degree of care, while the horse was in her custody or that of Miss Brown, unless the evidence shows that Miss Brown's use of the horse was by leave or consent of appellant through a duly authorized agent. *Funkhouser vs. Horne*, 62 Ill. 59; *Burlingame vs. Horn*, 30 Ill. App. 330; 3 R. C. L. 109 & 143. The instruction was erroneous in stating the law as to the degree of care required of appellee and in

(Page 3)

placing the burden of proof of negligence on appellant. The sixth, eighth, ninth and eleventh instructions given at the request of appellee contain the same erroneous propositions of law as the first. The seventh and twelfth instructions are misleading, since there was no controversy but that appellant proved her case and the burden of proving a defence was on appellee.

[The agency of Clayborn Edwards cannot be proved by his statements, which are hearsay, but he is a competent witness to prove his agency, if he was an agent of appellant. If as an agent of his mother he had the right to loan the horse and to receive him back from appellee before she had returned him to appellant's home and to turn it over to Miss Brown, and if the evidence shows that he, as such agent of his mother, did receive the horse back or direct it to be turned over to Miss Brown, in whose custody he was injured, then such facts if proven by a preponderance of the evidence would relieve the appellee from liability. These are questions of fact to be determined from the evidence and concerning which we express no opinion. For errors in instructions the judgment is reversed and the cause remanded.

Reversed and Remanded.

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GENERAL No. 6511.

APRIL TERM 1916.

AGENDA No. 16

NELLIE ELGIN, Appellee,

vs.

Appeal from Macon

THOMAS ELGIN, Appellant.

Opinion by Thompson, P. J.

Nellie Elgin in April, 1915, filed a bill against her husband for separate maintenance. The bill alleges that they were married in December, 1912; that a child was born to them and that in December, 1913, they separated; "that since the time of their separation your oratrix has been living separate and apart from her husband without her fault and since the separation he has never contributed anything to the support of your oratrix or their said child."

The answer of the defendant denies that they are living separate and apart without the fault of the complainant, and asserts that the complainant deserted and abandoned defendant without any cause or excuse and that he is anxious to have complainant return and live with him.

The cause was heard by the court and a decree entered finding that the complainant is living separate and apart from the defendant without her fault and adjudging that the defendant pay \$10 per month beginning with August 1, 1915, for the support of complainant and her child and \$25 expense money. The defendant prosecutes this appeal.

(Page 1)

The evidence shows that at the time these parties were married appellee was nineteen and appellant was thirty-three years of age. They had lived within about a quarter of a mile of each other for a long time. She had lived with her mother and he had lived with his mother, who was then 73 years of age, on a small farm of which appellant owned nine acres and his mother thirty acres and of which he will own one half after the death of his mother. The farm is a poor one, partly covered with timber. The residence contains five rooms and is on the land of his mother and she owns all the personal property on the farm.

The parties were married against the wishes of appellee's mother and after the marriage they lived with his mother until the separation, which from the evidence appears to have taken place two or three months before the birth of their child. Since the separation she has lived with her mother. A painstaking reading of the evidence of appellee in the record shows that the only cause given by appellee for the separation is that she wanted appellant "to get out of there." "To get out and get a home of our own." "He said he could not leave his mother." "She (his mother) wanted him to get out and he would not get out; and want-

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ted us to get a home of our own, and he would not do it, so I could not stay there, I wouldn't." "She would get mad because I would not ask her leave to go over home when I wanted to." The only fault appellee found with her husband was, that she wanted him to get a home of their own. "Outside of that you were willing to live with him?" "I

(Page 2)

don't know. I

don't believe I would because I would be afraid he would not get out and make a living." She further testified that he told her at all times that she could come back to his home at mother's house. The foregoing is substantially the entire evidence of appellee on the question of the cause of the separation.

After the separation appellant asked appellee to return to his home, but she refused and caused him to be indicted for wife and child abandonment. That case was never tried but, by agreement of counsel for the parties, he paid her \$5 per month for three months and \$6 per month of nine months. The evidence also shows that the mother of appellee is very hostile to appellant and forbid him coming on her premises, although from the time of the marriage up to the separation appellee returned to her mother's home twice a day. The mother of appellee was not a witness in the case, but from all the evidence it is apparent that she was the cause of the separation, and it was not caused by anything done either by appellant or his mother. On the witness stand appellant's mother showed some feeling against appellee, but nothing more than would be anticipated against a daughter in law, who described her son as a worthless no-account good-for-nothing, who had abandoned him and caused his arrest for wife abandonment. Counsel for appellee in their argument admit " that there was no serious trouble between this husband and wife."

The evidence shows that appellant was doing all he could for his wife. Appellee knew how appellant and his mother were situated before

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she married him and the evidence tends to show she agreed that the home of his mother should be their home after the marriage. The appellant and his mother were mutually interested in the small farm, and the mother's interest would not support her anywhere else, unless it be at a poor-house and the interest of appellant in this small, poor farm was all he had. The appellee in her bill of complaint does not allege any cause for the separation or its continuation. The evidence does not show any conduct on the part of appellant or his mother that is a reasonable cause for appellee leaving her husband or staying away from him. The appellant, as is shown by a clear preponderance of the evidence in the record, furnished appellee with a home commensurate with his ability, circumstances and condition in life; he did the best that he could and said he would get her another as soon as he could. The marriage relation should not be held so lightly that a wife may leave her husband because he is unable to furnish her a house under such circumstances as she may choose to dictate. The appellee did not by her own evidence make out a case for separate maintenance. The decree is reversed.

Reversed.

IVALEE TODD,

Plaintiff in Error,

vs.

Error to Morgan.

THE PRUDENTIAL INSURANCE CO.,

Defendant in Error

Opinion by Thompson, P. J.

This is an action upon a life insurance policy issued by the defendant in error on December 16, 1913, on the life of Edith Todd, a sister of plaintiff in error.

The declaration avers that defendant in error executed the policy sued on December 16, 1913, and delivered it to Edith Todd, now deceased; that Edith Todd died January 13, 1914, and after the death of the insured plaintiff in error, the beneficiary delivered the policy to defendant in error for the purpose of receiving the \$500 due thereon but defendant in error refuses to pay said sum and to return the policy.

The defendant in error filed the general issue, and two special pleas. The first special plea sets up a provision of the policy that it shall not take effect until it was issued and delivered by the company and the first premium paid thereon in full, while the health and occupation of the insured were the same as described in the application, and that the policy was not delivered nor the first premium paid during the life time and good health of the insured, but that it was delivered and the premium paid January 5, 1914, when the insured had just undergone a serious operation from which she shortly thereafter died. The second

(Page 1)

special plea sets up a release. Issues were joined on the first special plea and a replication was filed to the second averring that the release was obtained by fraud and deceit.

At the close of the evidence for plaintiff in error, the court directed a verdict for defendant in error, on which judgment was rendered.

The evidence shows that ~~E. E. Hatfield~~, an agent of defendant in error, frequently called at the residence of the mother of the insured to collect the premium on a policy held by the insured's mother and talked insurance to the deceased, who was a telephone girl and to her sister, plaintiff in error; that on November 20, 1913, a younger sister of the insured died and shortly thereafter, he called again and talked insurance to the two sisters, and that on November 28th, he got ^{the plaintiff in error} them to sign application blanks for insurance policies on the life of each in favor of the other, collected one dollar in advance on account of the premiums, and took a doctor to their residence and had the usual medical examination made. Shortly thereafter the girls called the agent over the telephone and he returned to their residence. They then told him they could not pay the premiums until December 15th or 16th, and requested him to have the

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policies dated at that time. The agent replied, "Miss Todd, you need not worry about that one bit. I will take care of it. I will pay for the policy myself, you can pay me when convenient, I will do

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that much for neighbor Todd. He is a Woodman." The agent also told the girls that "he could take care of the policies, as soon as he got them, he would send them over as soon as he got them back and they would be in force and effect. He would pay for them then—then we could pay him when we got a pay day which was about the middle of December." "According to Mr. Hatfield the policy was ours at the time it was delivered to him," and would be in force and effect. On December 27, the girls received notice from the agent that the policies had arrived the day before, "I received your policies all O. K. **this day**. Wish you all a happy new year." The policies remained in the actual possession of the agent until January 5, when the father of the girls received them. On January 4, the assured was taken with acute appendicitis, for which she underwent a surgical operation from which she died.

A letter from the defendant in error dated July 13, 1914, places the refusal to pay the loss on the sole ground, that the first premium was not paid and the policy delivered while her health was the same as described in the application. That was a waiver of proofs of loss.

The defendant in error did not offer any evidence. If the evidence of plaintiff in error was true, and it is not questioned in any way, then the defendant in error delivered the policy to its agent for the insured. The policy was to take effect, when he received it. Her health was the same when he received the policy as when he took her application and her

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dollar. The defendant in error, by its agent, induced the insured to believe that the policy would be in full force before the full payment of the first premium; that he, the agent, would pay it for her, and that he would hold the policy and it should be in full force and effect from the time he received it. There was an express contract, that it should be in force as soon as he received it.

A general agent clothed with power to solicit insurance, receive the application, forward it to the company, receive and deliver the policy and collect the premium has power to waive a condition in the policy notwithstanding that power is negated by provisions in the policy. *John Hancock Mutual Life Ins. Co. vs. Schlink*, 175 Ill. 284; *Devine vs. Federal Life Ins. Co.* 250, Ill. 203; *Mulligan vs. Metropolitan Life Ins. Co.*, 149 Ill. App. 516. There was sufficient evidence to require that the case be submitted to a jury and the giving of the peremptory instruction was erroneous.

There was no evidence introduced to sustain the second special plea. The release pleaded was not offered in evidence. The judgment is reversed and the cause remanded.

Reversed and Remanded.

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GENERAL No. 6521.

APRIL TERM 1916.

AGENDA No. 25.

VAIL CROSIER,

Appellee,

vs.

Appeal from Schuyler.

ARTHUR CROSIER,

Appellant,

Opinion by Thompson, P. J.

This is a suit in assumpsit brought upon a contract in writing signed by the parties. The declaration sets forth the contract in haec verba. It is dated February 20, 1915, and recites that the parties are tenants in common of certain described real estate for the partition of which a suit is pending; that to secure an amicable settlement, appellee agrees on February 23, 1915, to deliver a deed conveying his interest in said real estate to appellant and appellant agrees to pay appellee at the delivery of said deed \$1700.00. The contract also provides for an amicable division of the farm stock. It is averred in the declaration that the appellee executed and delivered the deed as agreed and that the appellant has not paid the sum agreed to be paid.

The defendant filed a plea of the general issue which is verified; a plea averring a mutual release of the instrument sued on and a plea averring the making of a subsequent contract by the parties, which took the place of the contract sued on. Issues were joined on the pleas. A jury returned a verdict in favor of the plaintiff for \$1400 on which judgment was rendered and from which the defend-

(Page 1)

ant prosecutes this appeal.

There is no dispute but that appellee had through his attorney Mr. Jarman begun a suit against appellant for partition of the land, in which he had a fourth interest, and that appellant owned the remaining three fourth and that the parties met and agreed upon a settlement and that the contract was reduced to writing.

The evidence for appellee tends to prove that the contract sued upon was the real contract between the parties. This contract was drawn by Mr. Jarman in the presence of both of them and was executed by them in triplicate. A copy of this contract was received by each of the parties and a copy retained by the attorney.

On the Saturday that the contract sued upon is alleged to have been executed, another contract between the same parties was drawn in their presence by Mr. Steele, an attorney who was not employed in the partition suit. Appellant testified that appellee suggested that they go to Mr. Jarman to draw the contract and that he objected, because he was appellee's attorney; that appellee said they must go there and go

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through the form of drawing a contract or Mr. Jarman would charge more fees, and appellant replied that he would go there with that understanding, and then they would go to some other attorney and have the contract drawn. Appellant testified that Jarman did draw a contract and that after they left his office, he, appellant, destroyed his copy and that appellee tore up a paper which he said was his copy.

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Appellant testified that after that, after 5 o'clock in the evening, they went to Mr. Steele's office and a contract was written for them by Mr. Steele, which was signed by them and left with Mr. Steele to hold for them. This contract provided for the payment by appellant of \$300 in cash and certain notes made by appellee and gave to appellee \$500 worth of farm stock. This contract appellee got from Steele subsequent to that time. He testified that, the Steele contract was the first one drawn and that appellant told him to go and get it and tear it up. The parties to this suit are brothers. The appellee is corroborated in many of his statements by a twin brother. Appellant received a letter through the mail dated January 20, 1915, proposing a settlement in the line of the contract prepared by Mr. Steele but appellee denies that he either wrote the letter or authorized it. The evidence is very conflicting. There is not such a manifest preponderance that this court can say the verdict of the jury cannot be sustained, when the trial judge, who had the benefit of a view of the witness, has approved the verdict by rendering judgment thereon. ✓

The real issue is, which of the contracts was adopted and acted upon by the parties. The contract sued upon was signed by the parties and a copy handed to each of them by Mr. Jarman. It was for the jury to say whether it was intended by appellant to be delivered. ✓

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The appellant having filed a verified general issue, it then devolved upon the appellee to prove the execution of the instrument sued on by a preponderance of the evidence. The execution of an instrument includes the signing of it and its delivery with the intention that it shall take effect. The court gave two instructions at the request of appellee, which contain the statement that if they believed from a preponderance of the evidence "that the plaintiff and defendant entered into the contract sued upon and set out in the declaration" and the defendant agreed to pay plaintiff \$1700 for his interest in said real estate and paid only \$300 and agreed to pay the balance, \$1400 in a short time and has failed to do so and that said contract has not been superseded or released then plaintiff is entitled to recover \$1400.00. ✓

Appellant contends that these instructions are misleading, that "entered into" does not mean signing and delivering with the intention that it shall be enforceable. The court in several instructions given at the re-

quest of appellant told the jury that it was incumbent on the plaintiff to prove the delivery of the contract relied on by him by a preponderance of the evidence and that the fact "that each left the office with a copy does not of itself make it a contract or constitute delivery. Before a delivery could exist the parties must intend that it was to be a present binding contract." This in-

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struction was given in four different forms. The instructions as asked by appellee if standing alone and unaided by other instructions might possibly by a liberal and free construction of the meaning of the words "entered into" be argued to mean "signed and passed to" but the latter part of appellee's instructions show that the words "entered into" required that there was an intention to do certain things. The repetition of the definition of "delivery" in the several instructions given at appellant's request, that it must be intended by the parties to be a present binding contract, remove any shadow of a claim that the jury could be misled by the instructions. ✓

It is also contended on behalf of appellant that counsel made improper and prejudicial remarks in the final argument to the jury. Counsel for appellee stated to the jury that "today Vail Crosier is practically without a dollar," "it is all the boy has on earth." We are unable to see how it was material what the financial condition of appellee was, or how his financial condition threw any light on the one question in issue—the delivery of the contract sued on,—yet counsel for appellant laid the foundation for the argument by calling appellee a boot legger and in his cross examination of appellee, counsel for appellant showed that appellee was not paying his debts and asked him if he intended to pay a certain note and if he ever paid any debts, to which appellee answered "I ain't got no money."

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Counsel may not complain of statements provoked by their own acts and which are based on evidence introduced by themselves. The court also sustained objections to the remarks and excluded them from the consideration of the jury. ✓

Finding no reversible error in the case the judgment is affirmed.

Affirmed.

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GENERAL No. 6529.

APRIL TERM 1916.

AGENDA No. 31.

THE RUSSEL & COMPANY,

Appellant.

vs.

Appeal from Christian.

CHARLES DUNBAR,

Appellee.

Opinion by Thompson, P. J.

On January 30, 1915, at the November term of the circuit court of Christian county, a judgment by confession for \$829.65 purporting to be entered on copies of two promissory notes, with a power of attorney attached authorizing any attorney to appear for the maker of said notes, and confess judgment thereon, was entered in favor of The Russel & Company against Charles Dunbar. On February 5, the defendant entered a motion to vacate said judgment and for leave to plead, and filed therewith an affidavit setting up what are claimed to be facts as to the execution of the original notes, which, if true, show there was a total failure of consideration.

The court thereafter entered an order staying execution and granting leave to the defendant to plead. The defendant filed the general issue and two pleas of failure of consideration. The plaintiff filed replications to the special pleas averring that the notes were made pursuant to a contract in writing for the delivery of certain machinery. To these replications the defendant rejoined that the notes were not made as averred by plaintiff but on a different contract which had not

(Page 1)

been preformed. Issues were joined. A jury returned a verdict for the defendant on which judgment was entered that the judgment of January, 30, 1915, be set aside and vacated. The plaintiff appeals.

It is contended that the court erred in not permitting the plaintiff to file counter affidavits on the motion to open the judgment and for leave to plead. There is no motion for leave to file such affidavits, or ruling by the court thereon, in the bill of exceptions and that question is not saved for review. If the court had denied a motion for leave to file counter affidavits there was no error in the ruling. The affidavit set forth facts showing a failure of consideration. All that appellee was required to show by his affidavit was a **prima facie** defence on the merits, and having shown that, he was entitled to a jury trial on the merits of the case. To hold otherwise would be to deny the right to a jury trial. *Gilchrist Transportation Co. vs. Northern Grain Co.* 204 Ill. 510; *Hood vs. Gehrs*, 170 Ill. App. 230; *Finkelstein vs. Schilling*, 135 Ill. App. 543.

The evidence shows that the appellee, a farmer living near Taylor-

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ville, can neither read or write except that he can sign his name. Appellant had sold appellee a second hand saw mill. An agent of appellant, subsequent to the sale of the saw mill to appellee, began negotiations with appellee to sell him a second hand engine, seperator and shredded with some other second hand appliances that it had at Illiopolis. The agent took appellee to look at the engine and other appliances and

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got appellee to sign a written contract for the purchase of the outfit subject to the approval of appellant. The contract provides that appellant is "to procure and ship for me to Russell and Company at Taylorville, one second hand," etc. which appellee agrees to receive subject to conditions named below, to pay the freight and charges from the factory and to pay \$1,000 in notes secured by mortgage on the property and the title to the goods is not to pass until settlement is made and accepted by the corporation. It is also agreed that said property is second hand, the purchaser having the privilege of examining the same before signing this order; the property is to be delivered in the condition in which it is found at the time of signing this order and with no further warranty whatever; the purchaser shall receive the above machinery provided it is found to be as described herein and settle for the same, and such receipt shall be full evidence of satisfaction to said purchaser and no further claims of any kind shall be made against said corporation. Immediately preceeding the signature is the statement, that the purchaser acknowledges that he has received and read an exact copy of the contract. There were three copies of the contract made. After it was signed by appellee, the agent of appellant wrote some words in the copy of the contract that was given to appellant but not in the others. It is evident appellee did not receive an exact copy of the contract. The evidence also shows that after it was signed, the agent made various statements as to the age of the machinery, and what it

(Page 3)

would do; that it was a twenty horse power engine four years old, and that there was no reason why the engine would not do the work for the saw mill, seperator and shredded and "we will make it work." The engine was one that had the name of appellant on it as its manufacturer.

Appellant afterwards shipped part of the outfit contracted to be sold to appellee to itself at Taylorville. A bill of lading, with the notes sued upon attached to it, and a chattel mortgage securing the notes were sent to a bank at Taylorville. A local agent of appellant notified appellee of the arrival of the property and told appellee of its condition, its horse power and what it would do, and that on the execution of the notes and mortgage and payment of the freight, that he could get the property. The appellee desired to have the property examined by a

machinist, but the agent of appellant dissuaded him and told him it was all right and if it was not, appellant would make it right. Appellee paid the freight, executed the notes and mortgage and the bill of lading was delivered to him. The local agent of appellant unloaded the machinery for appellee and with considerable difficulty, as it was so rusted out that it had barely sufficient power to move itself, ran it to the farm of a neighbor of appellee, where the engine was used in filling a silo; it was then taken to another farm and used in shredding corn but did not do as much work in three weeks as should have been done in a day. The evidence shows that the engine was

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fifteen or sixteen years old; that appellee bought it to operate the saw mill he had purchased from appellant, and that he only sawed part of three logs and found it was worthless except for old junk and insists that he did not receive it. The appellant never shipped all the appliances that the contract called for. A year afterwards appellant foreclosed its chattel mortgage on all the property and gave appellee credit for \$358.21 on the notes.

From the evidence it would appear that the agent of appellant made changes in the contract after it was signed and that appellee did not know what the changes were. Before the delivery of any of the property, after the contract was signed, the appellant warranted the engine to be suitable for certain work and to be of twenty horse power, when it appears it was so old and worn out that it scarcely had power to move itself.

The written contract could not be varied by evidence of conversations and statements about the outfit made by the agents of appellant before the execution of the contract, but evidence of warranties made after the contract was signed and before the approval of the contract by appellant and the delivery of the property of appellee and the execution of the notes was competent to show a change in the contract after the affixing of the signature.

There is evidence to sustain the verdict of the jury. We see

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no reason to disagree with the judgment of the trial court which approved of the verdict.

While it is assigned for error that the court erred in giving and refusing instructions, it is not pointed out in what the errors complained of consisted. A review of the instructions however shows that the jury were fully and fairly instructed and there is no error of law in the case; the judgment is therefore affirmed.

Affirmed.

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207
GENERAL No. 6550.

APRIL TERM 1916.

AGENDA No. 46.

BURRELL ENGINEERING and CON-
STRUCTION CO.,

Appellant,

vs.

Appeal from Tazewell.

PEKIN FARMERS' GRAIN CO.,

Appellee,

Opinion by Thompson, P. J.

Plaintiff began this suit against the defendant to recover \$297.76 averred to be due plaintiff for the preparation of plans and specifications for the construction of an elevator and office building. The declaration consists of the common counts and a special count on a contract in writing by which the defendant agreed to pay plaintiff, for its plans and specifications, two per cent of the contract price for the construction of the building. The defendant filed the general issue with an affidavit stating that it had three defences,— (1) that the plaintiff waived all claim for compensation, (2) that the plans were not prepared by a licensed architect and did not have a seal attached as required by the statute, and (3) that the plans, etc. were uncertain and vague. A jury returned a verdict in favor of the defendant on which judgment was rendered. The plaintiff appeals.

The evidence shows that appellant, a corporation, did prepare or furnish plans and specifications for the construction of a building for appellee. The original plans were amended and changed. Bids for the construction of the building, according to the plans furnished by appellant, were received from appellant and others. They were all rejected and the plans and specifications were then rejected by appellee and re-

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turned to appellant. The evidence tends to show that some contractors refused to bid on the work giving as a reason therefor that the plans and specifications were uncertain and defective. After the return of the plans to appellant, the evidence tends to show that appellant waived all claim for compensation for its plans, if appellee would permit it to bid on whatever plans of other parties appellee should adopt for the construction of the building. Other plans were adopted. On June 30, a copy of the new plans and specifications were sent to appellant, and it was notified by appellee that bids for the construction of the building on the plans adopted, would be received and opened on July 11. The time for the reception and opening of the bids was later changed to July 25. Appellant submitted a bid to erect the elevator for \$17,550. Another contractor submitted a bid to do the work for \$16,000 and being the lowest bidder, was awarded the contract.

It is contended that the court erred in giving instructions requested

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by appellee. The court gave fourteen instructions at the request of appellant and seven instructions at the request of appellee, none of which informed the jury that the burden of proving waiver or release of compensation, for preparing the plans prepared by appellant, was upon appellee. The third instruction given at the request of appellee informed the jury "that as a matter of law the burden of proof is upon the plaintiff to prove its case by a preponderance of the evidence. If you

(Page 2)

find that the evidence bearing on this case is evenly balanced or that it preponderates in favor of the defendant then the plaintiff cannot recover and you should find the issues for the defendant." The fourth instruction given at the request of the appellee is:— "The jury are instructed that after considering all of the evidence in the case, if you find that the evidence upon any question is equally balanced, you should answer such question against the party who has the burden of such issues, for in such case there would be no preponderance in favor of such proposition."

The burden of proving the release was on the appellee. If the evidence on that question was equally balanced and the appellant had proved its case as averred in any count, then the verdict should be in favor of appellant. There was but one witness on each side testifying concerning the release, and they agreed on much of what was said at that time. The question is close and the evidence in direct conflict on the question of the release and satisfaction. The giving of this instruction under the circumstances, after telling the jury that if they found "that the evidence bearing on this case is evenly balanced * * " then the plaintiff cannot recover, was reversible error, for the reason that the phrase "evidence bearing on this case is evenly balanced" includes and applies to the plaintiff's case and any affirmative defence presented, although the burden of a defence, which admitted and avoided

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the cause of action, was on the appellee.

There is also a question of fact in the case, as to whether the plans furnished by appellant were prepared by a licensed architect and whether a seal, etc. was on them as required by the statute. Since the case must be remanded for another trial, it is not necessary to discuss these questions at this time. The judgment is reversed and the cause remanded.

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Reversed and Remanded.

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GARDNER W. BRADSHAW,

Appellee,

vs.

Appeal from Pike.

SNY ISLAND LEVEE DRAINAGE
DISTRICT,

Appellant.

Opinion by Thompson, P. J.

This is an action in case begun by appellee against appellant. The declaration consists of one count and avers that appellant is a drainage district organized under the Levee Act; that the main canal is known as the Sny E'Carte and serves as an outlet for the surface waters of the district; that appellee was farming certain lands within the district, and that on September 1st, 1914, appellant wrongfully and willfully built a certain dam across said main canal and maintained the same for a long time causing water to back up and overflow the land possessed by appellee and thereby destroyed certain crops.

Appellant filed two special pleas and the general issue. The special pleas are the same in substance. They aver the organization of appellant in 1880; the construction of the main canal; that in December, 1913, the commissioners of appellant filed a petition for a special assessment against the lands of the district for straightening and deepening said Sny E'Carte and as a part of said petition filed plats, plans and specifications showing the work to be done; that said petition provided for straightening said Sny E'Carte through certain lands, thereby shortening it a mile and a quarter, and had attached a map showing the proposed

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change; that notice of the hearing on said petition was given as provided by law and a hearing had; that the prayer of the petition was granted and the work ordered to be done, and the commissioners were directed to prepare an assessment roll of benefits and damages; that \$372 was assessed as benefits against the land possessed by appellee, as tenant of Norman Nichols; that the assessment roll was filed and a hearing had thereon and Nichols testified thereat; that said dam was placed across said canal to prevent the water from flowing around in the old canal and to force the water through the new channel; that the dredge boat was located at a certain place below appellee's land and in order to float the dredge boat it was necessary, from the engineer's standpoint, to build said dam to prevent the water from flowing around in the old channel; that appellee at the time he rented said land knew the proceeding was pending and took his chances and planted said land, which had never been planted before in corn. The court sustained de-

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murrers to the special pleas. A hearing was had before the court without a jury and a judgment rendered in favor of appellee for \$187.30.

The only question presented on this appeal, that it is necessary to review, is the ruling of the court on the demurrer to the special pleas.

The appellant does not disclaim responsibility for building the dam. It attempted by the pleas to justify the act. The pleas do not aver, that the dam erected across the old canal was shown by the plans and specifications, or mentioned in the petition that was filed by the commissioners (Page 2)

missioners for straightening and deepening the main canal. The statute provides that the petition shall set forth plats and profiles of the work that is proposed to be done. Neither appellee nor his landlord had any means of knowing that appellant would build a dam across the old main canal to force the water into the new canal and hold it there for the purpose of floating the dredge boat used in digging the new ditch. The purpose of the improvement was to hurry the water off the land, not to retard it. The dam was not a part of the improvement to be made under the petition, it was a structure that rendered useless an improvement for the construction of which the land occupied by appellee had been assessed. It may have been in the mind of the engineer who prepared the plans, that the construction of the dam would lessen the expense of excavating the new ditch, but he did not make it a part of the plans filed. On the hearing on the petition no issue could have been raised concerning damages that would result to the land from the erection of a dam, because it did not appear from the plans that any dam was to be built. The owner of the land and appellee, his tenant, who had constructive notice of the straightening and deepening of the old canal, did not have any notice or information that a dam would be built to aid the contractor in his work. They did not have their day in court to present any claim for damages, that might be caused by an unknown expedient of the appellant to lessen the cost of the improvement.

While an action might be maintained against the contractor, or the (Page 3)

commissioners personally, if they authorized the contractor to construct the dam, an action also lies against the drainage district for causing the overflow. *Bradbury vs. Vandalia Drainage District*, 236 Ill. 36; *Sanitary District vs. C. & A. R. R. Co.*, 267 Ill. 252; *People ex rel vs. C. & E. I. R. Co.*, 262 Ill. 494.

It is also contended that the judgment is against the weight of the evidence. There is evidence in the record clearly sustaining the judgment. We cannot say on a review of the record that it is against the clear preponderance of the evidence.

Finding no error in the record the judgment is affirmed.

Affirmed.

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CECIL HORRIGTHS,

Appellee,

vs.

Appeal from Sangamon.

PETER TROESCH et al.,

Appellants.

Opinion by Thompson, P. J.

Cecil Horrigths brought this suit in case against Peter Troesch, George Reisch, Joseph Reisch and Annie Reisch to recover damages under Section 9 of the Dram Shop Act, for injury to her means of support.

The declaration avers that Peter Troesch on April 30, 1915, and for a long time prior thereto, conducted a dramshop on certain premises in the city of Springfield, and that on April 30, 1915, George Reisch, Joseph Reisch and Annie Reisch were the owners of said premises and had knowledge that said Troesch sold intoxicating liquor on said premises; that on April 30, 1915, Peter Troesch in his said dramshop sold and gave intoxicating liquor to George Young and Frank J. Horrigths causing said Young and Horrigths to become intoxicated, and that in consequence of such intoxication of said Horrigths and Young, the said Young on April 30, while thus intoxicated, shot and killed Frank J. Horrigths; that plaintiff is the wife of said Frank J. Horrigths and by reason of the death of her husband as aforesaid she has been injured in her means of support. The defendants filed a plea of not guilty. On a trial, a jury returned a verdict in favor of plaintiff against all the defendants for \$1800, on which judgment was rendered. The defendants appeal.

(Page 1)

Appellants contend:— "There was no evidence to show that appellants George Reisch, Joseph Reisch, and Annie Reisch were the owners of the premises in which the appellant, Peter Troesch, kept his dramshop or that they had leased said premises to Peter Troesch, or had knowledge that intoxicating liquors were being sold thereon by Peter Troesch. All that appears in the record is a stipulation dictated by counsel for appellee found on page 5 of abstract as follows: 'Mr. Cummins: to save time it might be admitted that George Reisch and Annie Reisch are the owners of these premises, and he was running a dramshop under a license of the City of Springfield.'"

In addition to the facts admitted by the stipulation in the record, there is evidence that Peter Troesch had been running a saloon in the premises described for eight years. Appellee testified that Troesch had been running a dramshop there for eight years. John Shay testified that he had been bar tender in Troesch's place of business for a year and a half, and that Horrigths was in the saloon from one o'clock to four o'clock in the afternoon of April 30, but he did not get any liquor there during that time. Appellant, Troesch, testified that he had run the place a long

time and had been notified not to sell whiskey to Horrighths.

That the owners of the premises knew that an occupant was engaged in the sale of intoxicating liquor may be shown by facts and circumstances. The fact that Troesch had conducted a dramshop on the premises

(Page 2)

for several years is a circumstance, from which a jury reasonably might infer that the owners had knowledge that liquors were sold on their premises. Eggers vs. Hardwick, 155 Ill. App. 250.

It is also argued that the court erred in giving two instructions at the request of appellee. ~~The~~ statement in the instructions complained of ~~is~~ ^{was} that if the jury from the evidence believe that Peter Troesch, either by himself or his bar tender, "sold or gave intoxicating liquors in said dramshop to one George Young and one Frank Horrighths, and that said George Young and Frank Horrighths drank the same and thereby became and were intoxicated in whole or in part, and that by reason thereof and in consequence of such intoxication," etc. The contention of appellants is that the words "in whole or in part" as used in said instructions refer to the degree of intoxication and not to the furnishing of liquors. The statute provides:— "Every * * * wife * * * who shall be injured in person or property, or means of support by any intoxicated person, or in consequence of the intoxication * * * of any person, shall have a right of action * * * against any person or persons who shall by selling or giving intoxicating liquors have caused the intoxication in whole or in part of such persons * * ." The wording of the instruction is awkward and the words, in whole or in part, as used have no reasonable meaning. ~~The~~ instructions ^{then} tell the jury that if from the evidence they believe that Troesch sold liquor to Young and Horrighths and

(Page 3)

they drank it, and thereby became intoxicated, and in consequence of such intoxication certain things happened then certain results followed. They correctly announce the propositions of law involved. If the intoxication was such, that in consequence of it plaintiff suffered damages to her means of support, the degree of intoxication, whether great or small, was sufficient to justify a recovery under the statute against parties made liable for damages by the statute. The use of the phrase complained of was harmless error, and could not prejudice or harm appellants or any of them.

It is also contended that the evidence does not prove that the intoxication of Horrighths and Young was the proximate cause of the shooting of Horrighths. [The evidence shows that Young and Horrighths were coal miners. They received their pay the morning of April 30, and spent the afternoon of that day in and about Troesch's saloon, drinking, and both got very drunk. They lived in the same house and went home drunk. While in that condition Horrighths quarrelled with his wife, Mrs. Young interfered and Young and Horrighths also got into a quarrel, after which Young, while still intoxicated, shot and killed Horrighths.] It was a question of fact for the jury to decide, from a review of all the evidence,

whether the intoxication of the parties or either of them, as averred, was the proximate cause of the shooting, which caused the death of appellee's husband. Stecher vs. People for use, etc., 217 Ill.

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348. The jury were fully instructed on the question of proximate cause in the numerous instructions given at the request of appellants and the evidence sustains the verdict and judgment.

There is no reversible error in the case, and the judgment is therefore affirmed.

Affirmed.

(Page 5)

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ALBERT R. KRUM,
Defendant in Error,

vs.

UNION CASUALTY INSURANCE
COMPANY, a corporation,
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This suit was based upon defendant's alleged liability under its policy of insurance against damage to plaintiff's automobile resulting from collision with another object.

The amended statement of claim alleged that the full value of the automobile was \$1700, and was lost except \$150, the value of salvage. Notwithstanding plaintiff introduced evidence that accorded with these figures, he did not attempt to prove that the automobile was incapable of repair, but proceeded on the contrary theory that it was capable of repair, and called several witnesses to the cost of repairs, the highest figure given being \$1500. There was no evidence of additional damage resulting from loss of use or otherwise.

Defendant disregarding the change of theory by plaintiff also introduced evidence of the cost of repair which its witnesses placed as low as \$750. The jury's verdict was for \$1550.

Complaint is made of the instructions given as to the measure of damages, and as to the refusal to give instructions thereon offered by defendant. It will only be necessary to consider the former.

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Plaintiff's Exhibit

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They presented three theories for application to the evidence: (1) that in case the automobile was capable of repair plaintiff could recover only the reasonable costs thereof; (2) if it could not be repaired the measure of damages would be the reasonable value of the machine before the collision less the reasonable value of the salvage after it was injured; and (3) if not capable of complete repair the jury might add to the reasonable cost of repair an amount sufficient to make up the difference between the value of the machine before the collision and after repair.

Regardless of any question as to the correctness of these theories, it is impossible to reconcile the verdict for \$1650 with the evidence for their application, and hence impossible to tell on what theory the verdict was rendered.

The jury could not correctly apply the first theory, because the verdict exceeds the highest estimate of the cost of repairs; nor the second, because both parties conceded by the evidence they offered that the automobile was capable of repair; nor the third, because there was no contention that it was not capable of complete repair and no evidence of the difference of the value of the machine before collision and after repair. The verdict not being supported by the evidence upon any theory of the instructions it can not stand. This view of the record precludes the necessity of discussing any other questions.

REVERSED AND REMANDED.

34 - 21276

ROSCOE WILSON,
Defendant in Error,

vs.

SAMUEL MENAGH,
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The judgment under review was for the face amount of a promissory note executed by plaintiff in error (defendant below) and payable to the order of "Lyon-Taylor Company", and endorsed "Lyon, Taylor & Company by M. H. Taylor."

The errors assigned and argued relate to the admission of the note in evidence without additional proof of the endorsement, and to the court's refusal to receive certain evidence in support of the affidavit of merits denying the endorsement and that plaintiff Wilson was an innocent bona fide owner and holder of the note before its maturity for a valuable consideration.

The affidavit of merits was sworn to by defendant's alleged agent. It was held in Warman v. First National Bank, 185 Ill. 60, that the affidavit required by section 52 of the Practice Act, denying the execution or assignment of an instrument in writing sued on, could not be made by an agent but must be made by the party to the suit making such denial. It is argued that such construction relates only to a denial of the signature

of one of the litigants. But the proviso in said section is, "If the party making such denial be not the party alleged to have executed or assigned such instrument, the denial may be made on the information and belief of such party."

This language is plain. Even when execution or assignment denied is alleged to be that of a third party, still under the express terms of the proviso, as held in the German case, "the one making the affidavit must still be a party to the suit."

The assignment not having been put in issue by the verification required by the statute, it was properly read in evidence. Nor, without such a verification could authority to make the assignment be questioned. (Walker v. Krebaum, 67 id. 252)

The statement of claim makes the note a part thereof, and liberally construed as the pleadings of the Municipal Court of Chicago are, may be treated as averring that the payee, by the name employed in the endorsement, assigned the note. While the name is slightly variant from that of the payee, yet it is not a question of variance, for the note received in evidence conforms to that described in or made a part of the statement of claim. If we may regard the informal pleading as substantially averring the endorsement to be that of the payee, then it could be questioned only by defendant's own affidavit, which may be on information and belief. Not having been so questioned it must be held to have been the payee's assignment. (Templeton v. Hayward, 65 id. 178.)

nor was there error in rejecting the documentary evidence offered by defendant. One document was the original statement of claim. The suit was brought by "First National Bank," and later defendant in error was substituted as plaintiff and filed another statement of claim on which the issues tried were taken. While both statements of claim were sworn to by the same attorney, that filed by the bank, which was no longer a party to the case, was not binding on defendant in error, and alone did not constitute proof that the latter was not the real owner and holder of the note when it was filed.

Another document offered and rejected was a letter by said attorney to defendant, written after the maturity of the note and several months before suit thereon, purporting at the time to have the note in his hands for collection for the payee. But without proof that the payee or said attorney for the payee actually had possession of the note at that time and that the letter was sent in the exercise of authority to collect it for the payee, his declarations therein, not purporting to have been made in the presence of or with the knowledge of defendant in error, were not admissible against the latter or as proof of the then ownership of the note. (Briskell v. Flint, 131 Ill. App. 137.)

If it was defendant's purpose to show that Wilson was not a bona fide holder of the note before maturity, he tendered no proof, and did not offer to prove any specific fact that tended to establish his contention or to support his defense.

The judgment will be affirmed.

AFFIRMED.

380 - 21367

JACOB COHN, doing business
under the firm name of
Chicago Bonnet and Hat
Frame Co.,

Appellee,

vs.

CARLOWITZ & CO., a
co-partnership,

Appellants.

2056
APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for the plaintiff Cohn, for \$852.50 as damages resulting, as claimed, from a breach of contract by the defendants. The case was tried by the court without a jury. The principal question is whether there was such a contract as contended for by plaintiff.

Cohn is a wholesale dealer in, and manufacturer of, hats and bonnets in Chicago. Defendants are importers of braid, hemp, etc., and are established in New York City. C. & H. Rowe, were their Chicago agents for soliciting orders. Through the Rowes there had been previous dealings between the parties to this suit.

On July 31, 1911, the plaintiff gave to the Rowes an order for 5000 pieces of Japanese hemp at the price of 37½ cents a piece which they forwarded to defendants. All orders were submitted to them for acceptance or rejection, said agents having no general authority to conclude any agreement. On receipt of the order in question from the Rowes (designated "No. 174") defendants wrote to plaintiff under date of Aug. 2, 1911. It is mainly on this letter

286-
443

and the subsequent shipment of 100 pieces of hemp early in September that plaintiff bases his alleged contract. The letter of August 2nd reads as follows:

"Gentlemen:

We have our Mr. Rowe's order #174 calling for: Art. 996, 5000 pieces #1 Quality.....37½ Cts. to be delivered 100 pieces in November next, the balance from December to March.

As Mr. Rowe will no doubt explain we have charged up these goods when they arrive otherwise there is no sale, but, we will hold them after they are charged subject to your order and will deliver them in installments according to your wishes.

Please let us know if this is perfectly satisfactory to you, and oblige,

Yours very truly,
Carlowitz & Co."

To this letter there was no reply as requested. It was followed immediately on Aug. 3rd by an explanatory letter from defendants to the Rowes, which the court found was, on its receipt, read to plaintiff, (who could not read English) and we think the evidence supports such finding.

The letter of August 3rd fully explains to the Rowes the terms on which defendants would accept that and similar orders for goods to be imported and delivered after future arrival. It says: "The only thing we can do is, put it aside until November, and execute it at that time if we have the goods." The letter proceeds to explain that as their orders in the meantime may exhaust the goods when the time for delivery arrives, they can accept orders only "without guarantee of delivery", and on condition of having the goods in November, unless they can charge and deliver at once, or charge at once and hold the goods for future instructions as to shipment. The somewhat ambiguous and ungrammatical language of the letter of Aug. 2, that "we have charged up these goods when they arrive, otherwise there is no sale etc., " if misunderstood by Cohn, was thus made

clear to him by the letter of Aug. 3rd, and by the Rowses' explanation promised in the letter of Aug. 2nd.

C. S. Rowe testified that he discussed with Cohn the basis and contents of the letter, and that Cohn suggested that he inquire of defendants whether they would bill the goods for delivery according to instructions to be paid for in March and April following. He communicated the proposition to defendants, and in their letter of reply, they stated it was "unsatisfactory," that they preferred to take the order "as originally proposed, namely, that we book the order without guarantee" of delivery. This letter was also read to Cohn.

Sometime in September plaintiff's manager telephoned to the Rowses to have 100 pieces of hemp expressed from New York. This was done and the goods were paid for at once. It was evidently a separate transaction and so regarded by Cohn himself for in his letter of Nov. 22, Cohn refers to the order as one for "2500 pieces to be shipped Jan. 1, 1912 and 2500, March 1, 1912," and asks the chance of his getting the "first shipment" about December 15. This appears to have been his first letter to defendants concerning the order. To it they replied: "We wrote you on August 2nd regarding this order to which letter we never received a reply".

There was subsequent correspondence which need not be referred to, as it does not serve to change the parties' relations. Nor need we refer to the changed conditions of the market which may have influenced plaintiff's attitude. For, it is manifest from the evidence that no contract for the 5000 pieces of hemp was entered into, and hence there was no basis

for the suit. It shows that defendants were willing to accept the order only on conditions to which plaintiff did not assent, and that he submitted a modified proposition in return, which defendants declined to accept. No contract enforceable against either party, therefore, was entered into. Hence, regardless of any other question argued, the judgment must be reversed with a finding here that no contract was entered into.

REVERSED.WITH FINDING OF FACT.

380 - 21367

FINDING OF FACT.

We find that no contract for 5000 pieces of hemp as alleged in and relied upon in the statement of claim, was entered into between appellants and appellee.

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20-7

61 - 21440

ED. HOCKADAY & COMPANY,
a corporation,
Plaintiff in error,

vs.

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY, a corporation,
Defendant in error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error (plaintiff below) a corporation, was the sales agent of the International Harvester Co. of America to take orders for the sale of agricultural implements, and under the terms of employment collected and received and retained from the sales the difference between the selling price and that listed to it by said Harvester Company. To fill orders taken by plaintiff in April and May, 1912, the Harvester Company delivered a carload of the goods ordered, to defendant at Deering, Illinois, for transportation to Custer City, Oklahoma, consigned to plaintiff, for which a bill of lading was issued. Defendant's transfer to the connecting road erroneously showed the destination to be Austin City instead of Custer City, which resulted in taking the car off the direct route for the latter place, and, because of consequent delay and plaintiff's inability to deliver the goods according to its contracts, in its canceling the order for the shipment and the diversion and delivery of the car to the Harvester Company at a different point. Had plaintiff been able to deliver the goods to its customers its profit, under the terms of its employment, would have been

2-17-13

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\$341.55. It filled the orders from another source at an expense of \$26.65. This suit was brought by it against the railroad company to recover these two items.

The case was tried before the court without a jury on stipulated facts and an agreement as to the questions to be determined.

Additional facts stipulated to are, that at the time of the delivery of the car to defendant "the bill of lading was the sole and only written undertaking between the parties hereto", and was a part of the tariffs duly published and on file with the Interstate Commerce Commission as required by law; that outside of the bill of lading defendant had no notice or knowledge of plaintiff's contracts for the goods in question or of its relations to the Harvester Company; that on the face of the bill of lading were the words: "Goods herein described are shipped for immediate sale and use at point of destination;" that on the back of the bill of lading are the following provisions:

"Sec. 3. * * * * *

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges if repaid) at the place and time of shipment under the bill of lading. * * *

Claims for loss or damages must be made in writing at the point of delivery or at the point of origin within four months after delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable."

It was further agreed that a reasonable time for delivery would have been eight days from Chicago, after June 3rd, the date of shipment; that a claim for loss by delay on the above basis was made by the Harvester Company October 25th following and declined; that in February following plaintiff

presented his first written notice of a claim referring to it as "filed by said harvester Company."

There are some additional facts stipulated which we deem it unnecessary to mention.

The record of this case was manifestly intended to present to the trial court certain questions of law upon an agreed state of facts. It is unnecessary to repeat after so many rulings on the subject, that the regular way in such a case to preserve the points of law for review, is to present written propositions of law to be held as such. (Flodin v. Lutes Co., 191 Ill. App. 195; Overland Motor Co. v. Tennant, 195 id. 6.) We do not regard an agreement between the parties as to what questions are to be determined as conforming to the statutory requirement on that subject.

The questions agreed upon for decision in this case were in substance whether under the facts agreed to (1) plaintiff had a right of action against defendant; (2) if so, whether the measure of damage should be the value of the property as provided in the bill of lading, or whether damages as above claimed were contemplated by the above quoted provision stamped by the Harvester Co. on the bill of lading, to-wit, "Goods herein are shipped for immediate sale" and "use" etc; and (3) whether plaintiff was estopped from recovering damages by virtue of the above quoted limitation of the time in which a claim for loss shall be presented to the company.

The record states in substance that the court ruled that plaintiff had no cause of action, (1) because of its cancellation of its order with the Harvester Company, and (2) because the claim filed was that of the Harvester Co. and not plaintiff's, and not in compliance with the

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requirement that it be filed within said period of four months.

Disregarding the informality of this manner of presenting questions of law for review, and treating the rulings as the court's holdings of the law, we nevertheless concur in them.

The special interest in the property which it is conceded plaintiff had, prior to cancellation of the order, it lost when it canceled the order. Whatever cause of action it may have had against defendant was terminated by that act.

and even if a cause of action remained in it thereafter, we think the quoted provisions of the bill of lading were binding as to the time in which the claim should have been presented, and plaintiff does not seem to have presented one at all.

AFFIRMED.

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79 - 21462

NATHAN LEVY,
Defendant in error,

vs.

SWIFT AND COMPANY,
a corporation,
Plaintiff in error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUDGE BARNES DELIVERED THE OPINION OF THE COURT.

This writ of error brings before us for review the record and judgment in a case in which defendant in error sued plaintiff in error to recover damages for injury to his horse, wagon and harness from the precipitation of hot lard thereon, occasioned by the bursting of plaintiff in error's pipe through which the lard was pumped. The damages assessed and judgment were for \$75.

The only error assigned necessary to consider is the refusal of the court to strike the amended statement of claim from the files, and, later, the refusal to arrest judgment, which raised the question of its sufficiency.

The refusals constituted reversible error for this reason alone, that there was no cause of action stated, as there was no averment in the pleading of negligence on the part of defendant.

And even though we could overlook the insufficiency of the pleading the record contains no proof of negligence. The proof merely shows certain injuries resulting to plaintiff while driving on a public highway from the bursting of the pipe and the throwing of its contents of oil over him and his rig, and very inadequate proof of damages. But there was no attempt either to allege or show in what respect the

201-457

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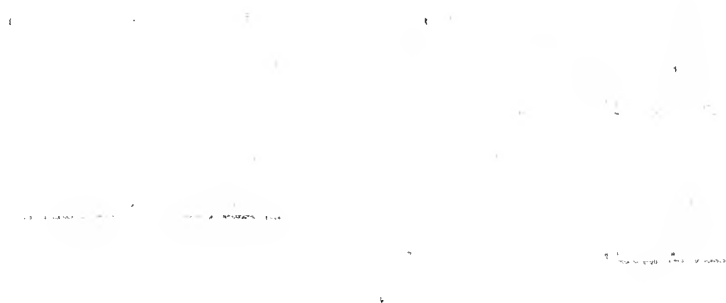
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company was negligent, or in what respect it failed, if any, to exercise ordinary care for the safety of those on the highway.

Because there was no cause of action alleged the judgment will be reversed. (Gillman v. Chicago
Rys. Co., 268 Ill. 305.)

REVERSED.



99 - 21489

HERMAN FREEMAN and J. E.
DARLOW, co-partners trading
as FREEMAN & DARLOW,
Defendants in error,

vs.

HAROLD P. GOULD,
Plaintiff in error.

ERROR TO

MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was a suit to recover real estate commissions. The trial was before the court without a jury. The finding and judgment were for the broker - plaintiffs.

The property was actually sold through one Schroeder, one of several brokers with whom, including plaintiffs, the property was listed for sale. The important and controlling question of fact was whether the contract for purchase, negotiated by Schroeder, was presented in binding form to Gould before defendants in error brought to him a written, binding contract to purchase said property signed by their customer. While the evidence was somewhat conflicting on this point, as to all other material facts there was but little controversy. We have carefully examined the evidence bearing on the controverted points and think the court was in a better position to determine them than we are. In no event are we able to say the court's finding was manifestly against the weight of the evidence.

There was sufficient evidence, if believed by the court, to warrant finding that a written contract, binding on the actual buyer, had not been presented to defendant before

201-453

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• *Chlorophyll a* (Chl a) is the primary photosynthetic pigment in all photosynthetic organisms. It is a green pigment that absorbs light energy in the blue and red regions of the visible spectrum. Chl a is found in the thylakoid membranes of chloroplasts in plants and algae, and in the plasma membrane of cyanobacteria.

[illegible]

10-11-1964

he received one from plaintiffs binding on their customer and embodying the terms on which defendant had verbally agreed to sell, and also that such customer was able, ready and willing to make the purchase on said terms. In reaching this conclusion it would subserve no valuable purpose to set out in detail the evidence bearing thereon.

No propositions were submitted to be held as the law of the case, and no serious questions are raised by the rulings of the court set out in the abstract. The points of law argued by plaintiffs in error, even if preserved for our consideration, are not important if the court's finding of facts as above stated was justified by the evidence.

The judgment will be affirmed.

AFFIRMED.

The first thing I noticed when I stepped
 out of the car was the smell of the sea.
 It was a fresh, salty breeze that
 carried with it the promise of a new
 adventure. I had heard so much about
 the beauty of the coast, but nothing
 could prepare me for the reality of it.
 The sun was shining brightly, and the
 water was a deep, inviting blue.
 I took a deep breath and felt a sense
 of peace that I had never experienced
 before. The world seemed to be
 waiting for me, and I knew that
 this was the start of something
 special. I had come to the right
 place at the right time, and I
 was ready to embrace whatever
 the future held. The sea was calling
 to me, and I was going to answer.
 I took a step forward, and then
 another, until I was standing on the
 shore. The sand was soft and warm,
 and the water was just what I needed.
 I had found my home, and I was
 finally at home.

126 - 21517

JULIUS L. MARKS,
Defendant in Error,

vs.

JOHN MANCOCK MUTUAL LIFE
INSURANCE COMPANY, a corporation,
Plaintiff in Error.

BRIDGE TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE WATKINS DELIVERED THE OPINION OF THE COURT.

This suit was brought by defendant in error, Marks, to recover of the company commissions as its agent in procuring two policies on his own life. The case was tried without a jury.

The pleadings of the defendant company consisted of two affidavits, the second being filed as an additional affidavit of merits and denying in effect that Marks was its agent and any promise to pay such commissions. Two issues of fact were presented, (1) whether Marks, at the time the policies were applied for, was defendant's agent, and (2) whether the policies were issued at his solicitation, or at that of his then employer, H. I. Nelson & Co., a piano company.

It appeared that in January, 1914, Marks brought in an application to the company's general agent, Strong, who allowed him a commission thereon, and agreed to pay him a commission on future policies he should write. Thereupon Marks undertook to solicit insurance for a time, but thinking himself not adapted for the work, sought Strong's influence to get

employment with the Nelson Company. Through Strong's influence it was obtained, and he was working for that company for months before the application for the policies in question was made, and it does not appear that he either solicited insurance or was recognized or sought recognition as an agent of the company in the meantime. While evidently to obviate the manifest conclusion from such circumstances that his agency contract was terminated, he testified in reply to the question whether he was not devoting his entire time as a salesman for the Nelson Co., that "This is a side line," yet there was no evidence of the fact that he attempted to solicit any insurance as a "side line", or that he was engaged in other work than that of salesman for said Nelson Company.

We think, too, that the record supports the inference that the policies were issued at the original request of the Nelson Co., and that it paid the premiums therefor. The fact that Marks, as he testified, subsequently paid the Nelson Company for what they advanced did not serve to contradict Strong's evidence, corroborated in part by the witness, Zitzman, that though Marks brought in the applications, they were taken on the Nelson Company's request and promise to pay the first premium.

But as we view the case it is immaterial at whose request the applications were taken if in fact Marks was no longer an agent acting under the previous arrangement for commissions. As before stated, we think from the circumstances above narrated Marks could not claim to be an agent in the transaction. His entry upon a new occupation with no understanding that he was to solicit insurance thereafter, must be regarded as a termination of

his agency contract and as so understood by both parties. If he could claim commissions on policies on his own life four months thereafter with no effort to procure other insurance in the meantime, and no understanding that he should, he might with equal plausibility do so at anytime before an express cancellation of the arrangement, no matter how long the interval or what change of relations ensued. We think the judgment should be reversed with a finding of fact that Marks was not the agent of plaintiff in error in the transaction in question.

REVERSED WITH FINDING OF FACT.

TOAST TO OURSELVES ONLY.

126 - 21517

FINDING OF FACT.

We find that defendant in error, Julius L. Marks, was not the agent of plaintiff in error, John Hancock Mutual Life Insurance Company, in procuring the policies of insurance issued upon his own life, referred to in the record, and that he had no subsisting contract for the payment of commissions by plaintiff in error at the time said policies were applied for.

165 - 21557

PAULINA KNIAT,
~~Defendant in error,~~
vs.
LILLIAN TIEDGE,
~~Plaintiff in error.~~

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Paulina Kniat obtained judgment for \$300 against defendant in error for money she claimed to have loaned to the latter. The case was heard without a jury. A reversal is sought on the grounds, (1) that the finding was against the weight of the evidence, and (2) that the court received hearsay evidence.

Even if the testimony complained of was incompetent, it was merely cumulative in character and insufficient of itself to warrant a reversal, if the court believed, as it evidently did, the rest of the testimony for plaintiff.

Nor are we able to say that the finding was against the manifest weight of the evidence. Several witnesses testified on each side and most of them were related to the party who called them. As to many matters the evidence on one side was a complete contradiction of, and irreconcilable with, that of the other. It would subserve no useful purpose to review the evidence when conclusions must finally rest on the credibility of the witnesses, which the trial judge, from his opportunity of seeing and hearing them, was in a better position to determine than we are. Where, as in the

1000 - 1110

1110 - 1120

1120 - 1130

1130 - 1140

1140 - 1150

1150 - 1160

1160 - 1170

case at bar, the record presents merely the question of the credibility of the witnesses and the story accepted is not improbable, this court will not usually disturb the lower court's findings.

AFFIRMED.

2. The first part of the paper is devoted to the study of the properties of the function $f(x)$ defined by the equation

$$f(x) = \int_0^x \frac{1}{1+t^2} dt.$$

213 - 21607

ALBERT FUCHS,

Defendant in Error,

vs.

W. J. KEARNS,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff Fuchs sued defendant Kearns to recover rent for October, November and December, 1914 at \$60 per month, under a written lease which contained the words: "Cancellation privilege granted September 30, 1914, if a registered letter notice is given by August 15, 1914, and \$30 paid extra," and a provision that the lessee might change for another apartment in the building without paying said \$30.

The rent was paid up to Oct. 1, 1914.

The preponderance of the evidence is that a written notice of the lessee's wish to be released from the lease on Oct. 1, 1914, was given plaintiff on Aug. 7, 1914 and that a check to plaintiff's order for \$30 was sent to and received by him on Sept. 28, 1914. Both the letter transmitting it and the check itself indicated that it was for the prescribed penalty for the cancellation privilege. Defendant returned the keys and moved from the apartment Sept. 25. A rent sign was placed in its windows by plaintiff shortly after the receipt of said notice. Plaintiff admits receiving and retaining the check for \$30, which has been kept good and is on the same bank and by the same maker as all other checks given and

1. The first of these is the fact that the

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6. The fifth of these is the fact that the

accepted under the said lease.

The court before whom the case was tried without a jury expressed doubt as to the legal effect of retaining said check for \$30 and of the failure to send it prior to Aug. 15th, and the parties refusing to compromise on the court's suggestion a judgment for \$90 was rendered against defendant, half the amount sued for. On the evidence the plaintiff was entitled either to the whole amount sued for or nothing. The court could not make a compromise the parties would not accept if the evidence would not support it.

If plaintiff did not intend to accept the check he should have returned it. His retention of it indicated his purpose to accept the cancellation of the lease pursuant to the notice given. He made no point that the \$30 was not received prior to Aug. 15th. On the contrary he expressed a preference not to receive it at all and to have defendant take a different apartment, as provided for in the lease. We think the manifest weight of the evidence was that the lease was terminated in accordance with its terms, and assented to by the plaintiff - lessor. We so find and reverse the judgment.

REVERSED WITH FINDING OF FACT.

-3-

213 - 21607

We find that the defendant in error,
Albert Fuchs, assented to the termination of the lease
in question, and that there was no rent due thereunder.

255 - 21630

WHITE CITY ELECTRIC COMPANY,
a corporation,
Defendant in Error,

vs.

MAURICE FLECKLES,
Plaintiff in Error.

PAGE 10

MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUDGE: I HAVE READ THE OPINION OF THE COURT.

While there are many assignments of error before us, no questions of law are preserved other than by rulings on the evidence, which are not argued nor controlling, thus leaving for consideration the question as to the sufficiency of the evidence, which is abstracted and argued only as it pertains to the liability of defendant, Fleckles, for so-called "Extras" in the way of electrical work done by the plaintiff company on his theatre building in Waukegan.

The pleadings and exhibits are not abstracted, but the written arguments proceed upon the theory that the suit was brought to recover for extra work on said building, that the written contract provided that all orders for extras should be in writing, that the orders therefor were given by one Haas who was defendant's resident manager of the theatre and present during the work of construction preparatory to the opening of the theatre.

There was no proof of express authority from Fleckles to Haas. But there was some evidence tending to show that Fleckles knew or could not but have known that the work in question was done or being done by plaintiff and that he made no objection thereto and accepted it.

1. The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations (1) for arbitrary values of the parameters α and β . It is shown that the system has solutions for all values of the parameters α and β if the function $f(x)$ is continuous and has a bounded derivative. The second part of the paper is devoted to a detailed study of the properties of the solutions of the system (1) for arbitrary values of the parameters α and β . It is shown that the solutions of the system (1) are unique and depend continuously on the parameters α and β . The third part of the paper is devoted to a study of the asymptotic properties of the solutions of the system (1) for large values of the parameters α and β . It is shown that the solutions of the system (1) approach zero as the parameters α and β approach infinity.

2. The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations (2) for arbitrary values of the parameters α and β . It is shown that the system has solutions for all values of the parameters α and β if the function $f(x)$ is continuous and has a bounded derivative. The second part of the paper is devoted to a detailed study of the properties of the solutions of the system (2) for arbitrary values of the parameters α and β . It is shown that the solutions of the system (2) are unique and depend continuously on the parameters α and β . The third part of the paper is devoted to a study of the asymptotic properties of the solutions of the system (2) for large values of the parameters α and β . It is shown that the solutions of the system (2) approach zero as the parameters α and β approach infinity.

3. The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations (3) for arbitrary values of the parameters α and β . It is shown that the system has solutions for all values of the parameters α and β if the function $f(x)$ is continuous and has a bounded derivative. The second part of the paper is devoted to a detailed study of the properties of the solutions of the system (3) for arbitrary values of the parameters α and β . It is shown that the solutions of the system (3) are unique and depend continuously on the parameters α and β . The third part of the paper is devoted to a study of the asymptotic properties of the solutions of the system (3) for large values of the parameters α and β . It is shown that the solutions of the system (3) approach zero as the parameters α and β approach infinity.

4. The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations (4) for arbitrary values of the parameters α and β . It is shown that the system has solutions for all values of the parameters α and β if the function $f(x)$ is continuous and has a bounded derivative. The second part of the paper is devoted to a detailed study of the properties of the solutions of the system (4) for arbitrary values of the parameters α and β . It is shown that the solutions of the system (4) are unique and depend continuously on the parameters α and β . The third part of the paper is devoted to a study of the asymptotic properties of the solutions of the system (4) for large values of the parameters α and β . It is shown that the solutions of the system (4) approach zero as the parameters α and β approach infinity.

But regardless of the evidences on these matters, which we need not review here, it appears that the architect, Gibb, was the superintendent and authorized to order extras, and there was enough evidence to warrant the jury in finding that the orders given through Haas were in fact his orders and ratified by him. The evidence tended to show that Gibb was seldom at the building but that Haas was present most of the time during the work of construction, giving instructions to the several subcontractors, and that Gibb told plaintiff's foreman that "any orders he gives you will be all right", and that Gibb, if not Pleckles, had knowledge of, and did not object to, the work done under Haas's orders.

While it is said the contract required such orders to be in writing, we think the jury were also warranted in finding that such provision was waived.

The law of agency and written contracts as argued is not questioned. The record presents mere questions of fact and we cannot say the verdict was against the weight of the evidence. Though it was disputed in some material respects, the credibility of the witnesses was for the court to determine.

AFFIRMED.

(1) The first of these is the fact that the
 government has been unable to secure the necessary
 funds to carry out its policy of expansion.
 (2) The second is the fact that the government
 has been unable to secure the necessary
 funds to carry out its policy of expansion.
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 (9) The ninth is the fact that the government
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 funds to carry out its policy of expansion.
 (10) The tenth is the fact that the government
 has been unable to secure the necessary
 funds to carry out its policy of expansion.

264 - 21659

PATRICK MCCORMICK,
Defendant in Error,

vs.

NATIONAL LIVE STOCK INSURANCE
COMPANY, a corporation,
Plaintiff in Error.

ERRER TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE PARKER DELIVERED THE OPINION OF THE COURT.

This was a suit upon an insurance policy.

Plaintiff in error insured defendant in error's horse against loss by death by bodily injuries "inflicted solely through external, violent and accidental means". The policy provided that under certain conditions it should be void, among them, unless, in case of death under the policy "the assured shall forthwith by registered mail or telegraph", give notice thereof to the company's secretary at Indianapolis, Ind. specifying certain matters of information.

Two points only are presented for review, (1) whether the cause of death was 'external' and 'accidental', it being concededly 'violent' in any phase of the case, and (2) whether the notice was sent 'forthwith'.

Both were questions of fact to be determined by the jury from the evidence, which, in our opinion warranted the implied affirmative conclusion as to both points, reached in a verdict for plaintiff.

The case rested on evidence produced by plaintiff, except his testimony under Sec. 33 of the Municipal Court Act. The horse slipped and fell while being ridden by a

boy down an inclined brick pavement, and being unable to rise except on his front feet, fell over on his side and died of a ruptured heart, as was ascertained by a post mortem examination by a veterinary. The circumstances detailed indicated that the horse slipped and fell on being checked from a run or trot.

Plaintiff in error contends that the heart rupture was occasioned by fright or otherwise before the fall, and not by the violence of the fall on the hard pavement. We find little in the evidence to support any such inference. It rests at most upon the theory of fright from a sudden checking of the horse. The evidence showed that the horse was a large, strong, working horse, not old, and did not have a bad heart, and indicated that the impact of the fall on the hard pavement produced the rupture. If such was the fact then we think it follows that death was caused by not only violent but external and accidental means. Death caused by stumbling and falling while running must be deemed accidental (Equitable Acc't. Co. v. Osborn, 13 L. R. A. 267) and such a death implies an external and violent agency as its cause. (Healey v. Mutual Accident Ass'n., 133 Ill. 556.)

The facts as to the notice were these: The horse died about 5:30 P. M. Oct. 28th. Plaintiff went to the place of the accident about one half hour later and then to the police station, and requested the police to keep the horse there. A notice, adequate in form and substance, was sent to defendant at its home office in Indianapolis, by telegram about 11 o'clock the next day and by registered letter in the afternoon of the same day. Both were

received in due course, but defendant took no action thereon before Nov. 19th when it called for proofs.

Plaintiff would have satisfied the conditions of the policy by resorting to either method of giving notice. Had he sent a registered letter the evening of the accident it probably would not have been received as soon as the telegram was. If a registered letter mailed at once would have met the purposes of the notice then the telegram actually received before a letter could have arrived, ought to have done so. In other words it was sent within a reasonable time, and therefore came within the meaning of the word 'forthwith', as used in the contract of insurance. (McCannan v. Germania Ins. Co., 101 id. 621.)

We think the judgment should be affirmed.

AFFIRMED.

62 - 21443

PATRICK BRENNAN,
Defendant in Error,

vs.

IDEAL HEATING COMPANY,
(Corp.),
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

By this writ of error it is sought to review a judgment recovered by defendant in error (plaintiff below), against plaintiff in error (defendant below), for \$131.40 and costs. Plaintiff's claim was for the value of certain labor and materials used in making alterations in and additions to a certain hot water heating plant installed by defendant in the home of plaintiff, under a certain written contract, in order as alleged to place said job in a good and workmanlike manner, as required by said contract.

It is strenuously contended by defendant that there is not sufficient evidence in the record to sustain the judgment of the court, and we are of the opinion that such contention is well founded. The only evidence appearing in the record with respect to the value of the several items contained in plaintiff's statement of claim, is that of the witness Boyd who testified on behalf of the plaintiff, to the effect that the value of this work, including the materials used in connection therewith, was \$375, but stated that he was unable to specify the value of each item

757

1. The first part of the report is devoted to a general survey of the situation in the country.

2. The second part is devoted to a detailed analysis of the economic situation.

3. The third part is devoted to a detailed analysis of the social situation.

4. The fourth part is devoted to a detailed analysis of the political situation.

5. The fifth part is devoted to a detailed analysis of the cultural situation.

6. The sixth part is devoted to a detailed analysis of the foreign relations of the country.

7. The seventh part is devoted to a detailed analysis of the internal security of the country.

8. The eighth part is devoted to a detailed analysis of the military situation.

9. The ninth part is devoted to a detailed analysis of the administrative situation.

10. The tenth part is devoted to a detailed analysis of the judicial situation.

11. The eleventh part is devoted to a detailed analysis of the legislative situation.

separately. It appears from an examination of the record, that certain items included in the estimate testified to by the said Boyd, were improper. For instance, a charge is made for replacing plate in the boiler door. The evidence shows that this door was delivered by defendant to plaintiff in good condition, and that it was not broken until three or four weeks after its delivery. There is nothing in the evidence to show that this was the result of defective material or workmanship or that it was broken through defendant's negligence. A second item included in said estimate was a charge for changing pipes in first floor toilet room radiator. Neither the contract, the proposal nor the specifications make any mention of a radiator to be placed in the first floor toilet room, hence there can be no charge against defendant for making alterations thereon. Inasmuch as plaintiff's claim was for a lump sum, and there being no evidence of the separate value of the two foregoing items, in the present state of the record it is impossible to deduct them from the gross charge. Therefore the judgment must be reversed and the cause remanded for a new trial. In this view of the case it becomes unnecessary for us to examine the other errors assigned by defendant.

REVERSED AND REMANDED.

81 - 21464

ALEXANDER SMITH et al.,
Defendants in Error,

vs.

ISAAC ETTTELSON,
Plaintiff in Error.

BR BR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This action was brought on a contract of indemnity, by the terms of which defendant (plaintiff in error), agreed to protect plaintiffs (defendants in error), against any claims made by other brokers, for commissions in connection with a certain loan which plaintiffs negotiated for the defendant. After the loan in question was made, one Julius Hielaca, a brother of the defendant, brought suit and recovered judgment against plaintiffs for a commission arising out of said loan. The present action is for indemnity under the aforesaid contract, for the amount paid in satisfaction of said judgment. [The contract of indemnity ^{was} based upon a letter which the defendant wrote plaintiffs on September 9, 1913, as follows:

"Peabody, Houghteling & Co.

In consideration of your acceptance of my application for a bond issue of \$40,000 and for other good and valuable consideration, I agree to protect you against claims of any broker who may have presented this matter to you."

Simultaneously, plaintiffs sent defendant a letter wherein they accepted his application in question. The application referred to in each of the aforesaid letters was dated

470

1. The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that proper record-keeping is essential for the transparency and accountability of the organization. This section also outlines the various methods used to collect and analyze data, ensuring that the information is reliable and up-to-date.

2. The second part of the document focuses on the implementation of the proposed changes. It details the steps involved in the process, from the initial planning stage to the final execution. This section highlights the challenges faced during the implementation and provides solutions to overcome them. It also discusses the role of each department in ensuring the successful completion of the project.

3. The third part of the document provides a summary of the findings and conclusions. It reiterates the key points discussed in the previous sections and emphasizes the importance of continued monitoring and evaluation. This section also includes recommendations for future actions and a timeline for the next steps.

4. The final part of the document is a conclusion that summarizes the overall findings and provides a final statement on the importance of the project. It expresses confidence in the results and encourages the organization to continue its efforts to improve its operations and achieve its goals.

August 27, 1913, and ^{read in} ~~that~~ part with which we are here
~~concerned reads~~ as follows:

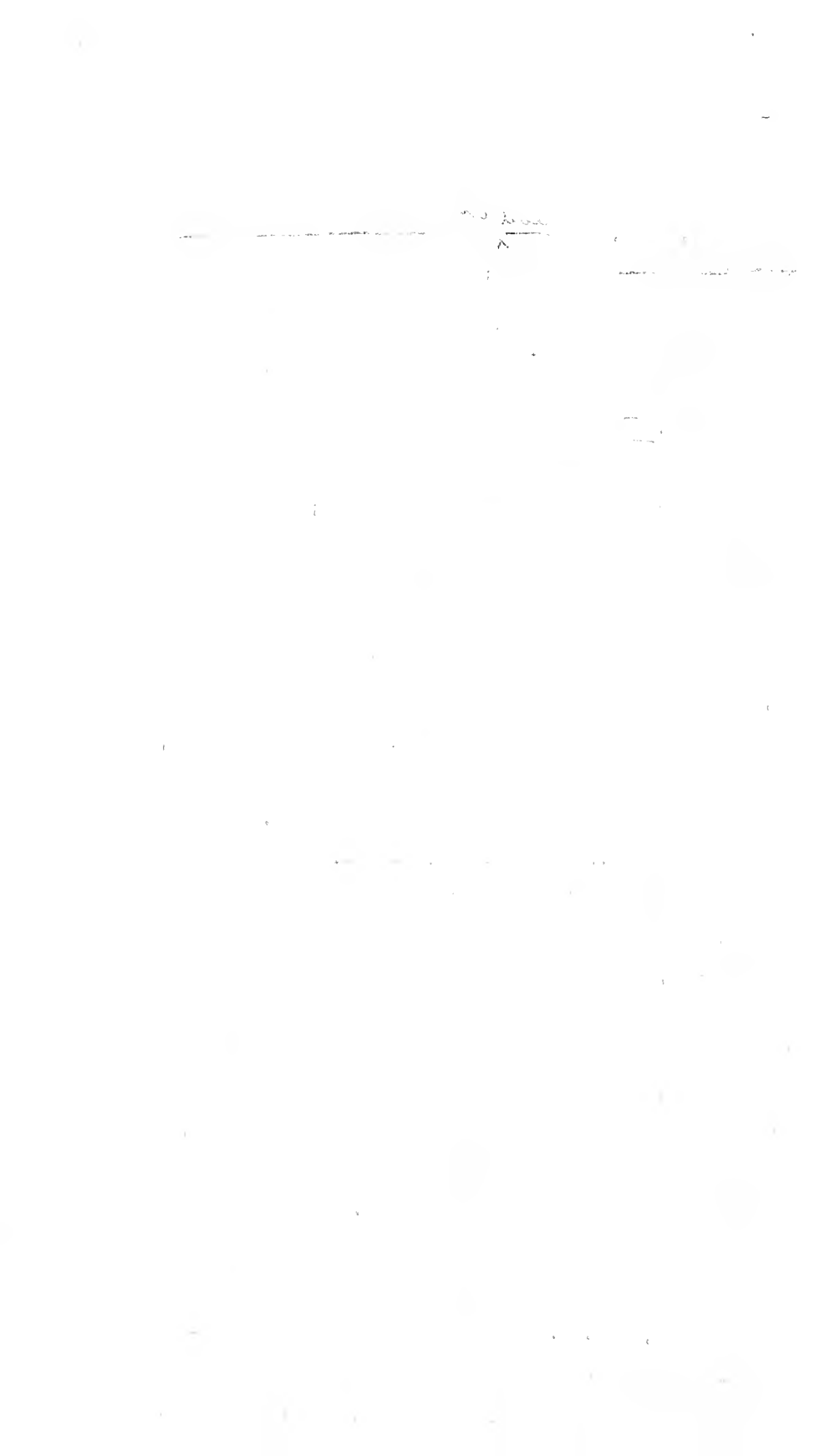
"I hereby engage your services to
procure for me a loan or bond issue at your
option * * * .

"As security for such loan I will give
a principal note and interest notes or a
series of \$100 bonds and a mortgage or trust
deed."]

It is contended by the defendant that a contract
of indemnity should be strictly construed; that where an
instrument is complete and unambiguous on its face,
extraneous evidence is inadmissible to vary or augment
its terms. That such is the law under the circumstances
stated, is undisputed. A rule equally well recognized
is, that where parties have executed several instruments
contemporaneously, relating to the same subject matter, all
of the instruments should be construed together in
determining the real intention of the parties. People v.
Economy Power Co., 241 Ill. 280, p. 351.

Defendant's letter of September 9th hereinabove
quoted, makes reference to his application for the loan
in question, the acceptance of which forms the primary
consideration for his undertaking. Plaintiffs' letter of
the same date likewise mentions defendant's application of
August 27th. By reference thereto, the parties have made
this application a part of the contract of indemnity, and
it must therefore be so considered in determining the
liability of the defendant thereunder.

By the recitals contained in said application,
it was optional with plaintiffs as to how the loan should
be evidenced, - i. e. whether by bonds or otherwise.
Notwithstanding the fact that defendant's letter of
indemnity refers only to a bond issue, the loan at this



time not having been placed, it was still optional with the plaintiffs, under the application in question (which is part of the contract of indemnity) "to procure a loan or bond issue." Defendant was primarily interested in procuring the loan. The manner of evidencing it was merely incident thereto. Considering the application and defendant's letter of indemnity together as parts of a single contract, it is obvious that the said contract of indemnity was intended to protect the plaintiffs against the claims of other brokers for commissions arising out of the loan, regardless of the manner in which it was evidenced. We are therefore of the opinion that the court properly found the issues for the plaintiffs.

AFFIRMED.

116 - 21506

E. M. GULLICK,
Defendant in Error,

vs.

THE PETER KUHNHOFFEN BREWING
COMPANY, (a corp.)
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Defendant in error (plaintiff below), recovered judgment against plaintiff in error (defendant below), for rent of certain premises owned by plaintiff, from which said judgment this writ of error has been prosecuted. Plaintiff's recovery was based upon a lease alleged to have been entered into by and between the parties, whereby the said premises were demised to defendant for a period of three years commencing May 1, 1913. Prior to said last mentioned date defendant had been in possession of said premises as assignee of other tenants. The lease assigned to defendant expired April 30, 1913. For some months prior thereto negotiations for a new lease were carried on between defendant and plaintiff's agents, as a result of which defendant, on or about February 13, 1913 signed a proposed lease covering a period of three years commencing May 1, 1913, which said proposed lease, bearing defendant's signature, was by plaintiff's agents submitted to plaintiff, who was a non-resident of Chicago, for his acceptance. The evidence shows that the plaintiff did not acknowledge receipt of the lease, nor did he in any

way indicate whether he intended to accept or reject the proposal of defendant; that defendant, becoming anxious about the matter, made repeated inquiries of plaintiff's agents regarding it, but was on each occasion informed that they had not received the proposed lease back and that they did not know whether plaintiff had accepted same. As May first drew near, defendant informed plaintiff's agents that it was imperative to know immediately whether or not its said proposal had been accepted, as it had sub-tenants whose interests had to be protected; whereupon they again informed defendant that they had not received any word from plaintiff and did not know whether or not he had executed the proposed lease. Plaintiff's agents thereupon advised defendant to send them a check for the May rent which they promised to accept. Accordingly the May rent was paid by defendant and accepted by plaintiff's agents, and the question of the renewal lease was apparently dropped on both sides, - plaintiff never having acknowledged receipt of the proposed lease nor manifested his acceptance or rejection thereof either to his agents or to the defendant, and defendant making no further inquiries. On March 6, 1914 defendant notified plaintiff's agents of its desire to terminate the tenancy on April 30, 1914. This communication was acknowledged by plaintiff's agents under date of March 19, 1914 in the following language:

"Yours of March 6th received and contents fully noted. We are sorry to lose you as a tenant, but if in the future anything arises, that we feel you will be interested in, we will take it up with you.

"Thanking you for past courtesies, we are,

Yours respectfully,"

Defendant paid the rent up to and including April 30, 1914 and then vacated the premises. Nothing further was said about the alleged lease in question until August 18, 1914, when plaintiff's agents wrote to defendant informing it in substance, that its lease to the premises in question did not expire until April 30, 1916, and that they would look to defendant for the payment of the rent thereunder.

It is argued by defendant, that the proposed renewal lease was never accepted by plaintiff, and hence, the most vital element, - the meeting of the minds - was lacking; that by payment and acceptance of the rent for May, 1913, defendant, as a matter of law, became a holdover tenant for another year; and that by making this new arrangement, the former offer to take a three year lease was withdrawn.

The action on the part of the defendant in submitting the proposed lease to plaintiff's agents amounted to nothing more than an offer to rent his premises for three years. This offer the plaintiff was obliged to accept, if at all, within a reasonable time. Plaintiff did not notify defendant, nor did his agents, that the lease had been accepted, until some time in August, 1914 (approximately a year and a half after the offer was made).

"An offer may be revoked or withdrawn at any time before it is accepted and acceptance communicated to the party, for, until then, there is neither agreement or consideration." 9 Cyc. 284.

"An offer once made is not to be regarded as open for the acceptance indefinitely. If no time for acceptance is fixed by the terms of the offer, and acceptance is made within a reasonable time and before revocation, it completes the contract; but delay in acceptance beyond a reasonable time causes the offer to lapse and a subsequent attempt to accept is of no legal effect. No formal withdrawal of the offer is necessary, if it remains unaccepted after a reasonable time." 1 Page on Contracts, ch. 66, sec. 38; Trounstein & Co. v. Sellers, 35 Kas. 447; 9 Cyc. 299.

Under the circumstances, defendant was warranted in assuming that its offer had not been accepted. Following the advice of plaintiff's agents, defendant paid the rent for the month of May, 1913; and as no new lease appears to have been made prior to or at that time, the payment of the May rent by defendant and the acceptance thereof by plaintiff created a year to year tenancy for the defendant. (Appelstein v. Kuhn, 225 Ill. 115). On this state of the record, the conclusion is inevitable, that the defendant's tenancy terminated April 30, 1914 and that defendant was justified in vacating the premises at that time. We are therefore of the opinion that the finding of the court below is clearly and manifestly against the weight of the evidence. Accordingly the judgment must be reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.



116 - 21506

FINDING OF FACTS.

We find as a fact, that the proposed lease upon which defendant in error, A. H. Gullick, has sought to recover from The Peter Schoenhofen Brewing Company, plaintiff in error, in this action, never became a binding obligation between the parties; that there was no acceptance thereof by defendant in error within a reasonable time; and that plaintiff in error, on and after May 1, 1913, had a year to year tenancy, which was terminated April 30, 1914.

153 - 21545

NEW CITY PRODUCE COMPANY,
a corporation,
Defendant in Error,

vs.

R. W. WALL,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

The judgment herein complained of was entered by confession upon a warrant of attorney and cognovit, for rent and attorney's fees due under a certain lease entered into between defendant in error (plaintiff below), and plaintiff in error (defendant below).

It is urged by the defendant, that the warrant of attorney upon which the judgment in question rests, is void because of uncertainty. The lease in question was executed by the plaintiff company, by Edward Steer, its president, and by the defendant. In the body of the lease, however, Edward Steer is named as the lessor, while no mention is made of the lessee's name. In the absence of a bill of exceptions in this case, this apparent uncertainty as to the parties must be held to have been cured by the judgment. The court below having found that a statement of claim, a warrant of attorney, a lease and cognovit had been filed, the appearance of the defendant entered, and the amount due on the lease confessed, it must be presumed that the court also heard sufficient evidence to enable it to correctly determine whether or

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255

1. The first part of the paper is devoted to the study of the properties of the function $f(x)$ defined by the equation

Journal of Interpersonal Violence 26(10) 1978-1996
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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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• Admission of the fact of the existence of the

not any irregularity existed. Boyles v. Chytraus, 175 Ill. 370.

In this view of the case, it becomes unnecessary to consider the other points raised by the defendant. Accordingly the judgment will be affirmed.

AFFIRMED.

PETER FOX, ANTHONY M. FOX,
JOHN L. FOX, JOSEPH J. FOX,
FRANK C. FOX, MICHAEL E. FOX,
WM. J. FOX and MNG. B. FOX,
trading as the Peter Fox Sons
Company,

Defendants in Error,

vs.

THE WESTERN UNION TELEGRAPH
COMPANY, a corporation,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Defendants in error (plaintiffs below), recovered a judgment for \$207.40 against plaintiff in error (defendant below), for an alleged loss of 10% per bushel on 2,074 bushels of potatoes, said to have occurred through the erroneous transmission by defendant of the following telegram, dated November 4, 1911, which plaintiffs sent to one A. E. Homstead, Black River Falls, Wisconsin: "Offer sixty nine delivered. Fancy bulk white potatoes. Prompt shipment. Wire accept or not." Said telegram, when delivered to the addressee, read, "Offer seventy nine delivered," etc. Homstead accepted the supposed offer of 75%, but before making shipment of the potatoes in question, communicated with plaintiffs by long distance telephone, when the error was discovered. Plaintiffs, however, ordered the potatoes shipped at 75%. Afterwards, the judgment herein complained of, was recovered by plaintiffs against the defendant.

Several points have been raised by defendant

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in its assignment of errors, but in our view of the case, it is necessary to consider only one.

There is a pronounced lack of evidence in the record, of any damages having been suffered by plaintiffs as a result of the negligence charged. What the market value was for potatoes at the time in question does not appear, nor is there any other evidence in the record from which it can be reasonably inferred that plaintiffs sustained a loss by reason thereof. From the mere fact that there was an error of 10% per bushel in the transmission of plaintiffs' message, it does not necessarily follow that this is the measure of plaintiffs' damages. The burden of proving damages was upon the plaintiffs, and they having failed therein, the judgment must be reversed.

Plaintiffs are, however, entitled to recover the amount which they paid the defendant for sending the message in question, which, with interest, amounts to 57% and for this amount judgment is here entered for the plaintiffs.

REVERSED AND JUDGMENT HERE.

193 - 21586

CATHARYN WILSON, Executrix
of the Estate of Thomas S.
Wilson, deceased,

Defendant in Error,

vs.

F. NORWOOD WILSON,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This was an action brought by defendant in error (plaintiff below), against plaintiff in error (defendant below), on a promissory note. At the close of all the evidence the court directed a verdict for the plaintiff and entered judgment thereon. Defendant brings error.

It is contended by the defendant that the trial court erred in directing a verdict for the plaintiff. The affidavit of merits alleged, by way of defense, that there was a failure of consideration for the note sued upon. This being an affirmative defense, the burden of proving it was upon the defendant. Certain evidence was offered on behalf of the defendant, consisting of letters, checks and the testimony of Mrs. Sarah E. Wilson, mother of the defendant and of plaintiff's intestate. Her testimony was mainly to the effect that she had received \$500 from plaintiff's intestate about July, 1910. The note sued upon recites on the back that it was "to take the place of my note due September 7, 1910," - indicating the existence of a former indebtedness by defendant to

plaintiff's intestate. On July 18, 1910, plaintiff's intestate wrote defendant a letter which reads in part as follows: "Yours of the 15th reached me this A. M. * * * Of course you can keep the money and do not bother about the interest part." From this letter it will be readily seen that the defendant was already indebted to plaintiff's intestate during July, 1910, - the time when Mrs. Wilson testified to having received \$500 from plaintiff's intestate. Therefore, her testimony in this regard can have no bearing upon the note here sued upon. The letters and checks introduced by the defendant in no way corroborate the defendant, but, on the contrary, tend to show that he was indebted to plaintiff's intestate.

From a careful examination of the record, we are of the opinion that the evidence offered on behalf of the defendant presented no question of fact, and that the trial court therefore properly directed a verdict for plaintiff.

Finding no reversible error, the judgment is affirmed.

AFFIRMED.

STANISLAW KUZMIERCZYK,
Defendant in Error,

vs.

JOSAPH SCHLITZ BREWING COMPANY,
a corporation,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Defendant in error (plaintiff below), recovered a judgment against plaintiff in error (defendant below), for damages to his property.

It is contended by defendant that the statement of claim is fatally defective in that it fails to set up a cause of action, and hence the judgment should be reversed.

[The statement of claim filed herein alleged as follows:

"Plaintiff's claim is for the killing of his horse and injuries caused to plaintiff's wagon and harness on to-wit: the 3rd day of March A. D. 1914, in Milwaukee Ave., at or near its intersection with Chicago Ave., in the city of Chicago, by reason of a wagon then and there belonging to defendant corporation and then and there operated and managed and under the control of a servant of defendant corporation, colliding with plaintiff's said horse, wagon and harness; said collision being caused by the negligence of the servant of defendant corporation to the damage of plaintiff in the sum of \$200.00"]

The alleged defects are that the statement of claim fails to set forth any act of negligence on the part of defendant, or that plaintiff was in the exercise of due care at and just prior to the time of the collision.

The statement of claim avers, - though not in the technical form of common law pleading - that the act complained of occurred by reason of defendant's negligence.



Under section 40 of the Municipal Court Act, it is not necessary to set forth a cause of action with the particularity required by the rules of common law pleading. Nor is it essential to set forth that plaintiff was in the exercise of due care prior to and at the time of the collision. Said section requires only a "brief statement of the nature of the tort and such further information as will reasonably inform defendant of the nature of the case he is called upon to defend." Enberg v. City of Chicago, 271 Ill. 404. The statement of claim hereinabove quoted conforms to the requirements of said section.

It is also urged by the defendant that the evidence is insufficient to sustain the judgment, and that the damages are excessive. The evidence shows that defendant's servants left the team and wagon in question on the street unattended, while they went into a basement saloon to deliver beer; that during their absence, the team proceeded down the street and collided with plaintiff's horse and wagon, causing the damage complained of.

Defendant contends that the horses' heads were fastened by hitching straps to the pole of the wagon they were drawing. While it is claimed this was the usual and customary way of fastening a team while unattended, yet it is apparent from the record that this method was inadequate; and whether or not defendant was negligent in this regard was a question of fact, which the court below found adversely to defendant.

From an examination of the entire record in this case and from a careful consideration of all the evidence submitted and the inferences that can be reasonably drawn

therefrom, we are of the opinion that the judgment of the court is supported by the evidence.

Finding no reversible error in the record, the judgment will be affirmed.

BY COURT.

268 - 21663

CHICAGO WASHOE COAL COMPANY,
a corporation,

Appellant,

vs.

R. C. WHITSETT and A. H.
WHITSETT, co-partners doing
business as R. C. WHITSETT COAL
& MINING CO.,

Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Appellant (plaintiff below), brought an action against appellees (defendants below), to recover damages for the alleged breach by the defendants of a written contract by wrongfully refusing to deliver to the plaintiff certain coal as therein provided. At the conclusion of plaintiff's evidence, by direction of the court, the jury returned a verdict finding the issues for the defendants, upon which judgment was entered against plaintiff for costs, which judgment plaintiff by this appeal seeks to reverse.

By the terms of the contract out of which this action arose, defendants agreed to furnish to plaintiff 150 tons per day of certain grades of coal, from December 28, 1909 to March 30, 1910; for which payment was to be made on the 10th day of each month following shipments. The evidence shows that certain shipments were made during the month of December, 1909, which were paid for on January 15, 1910. There were also shipments made by defendants to plaintiff during the month of January, 1910, which, for the

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hereinafter
reasons/stated, have not been paid for by the plaintiff.

On January 17, 1910 plaintiff wrote the defendants as follows:

"We beg to call your attention to the fact that we have received no shipments on our contract made with you for coal from Ward, Ill., since Jan. 8, and have had the matter up with your Mr. Stinson and was assured by him that he was watching the same and was doing all he could to get same forwarded to us.

"We must insist that we receive shipment on this contract to the extent of 150 tons per day as stipulated,"

to which the following reply was made by defendants on January 18th:

"We are in receipt of your favor of the 17th inst. and are surprised to note that you still expect to receive shipments under your contract. If you refer to your contract you will note that it calls for payments on or before the 10th of each month for all shipments made during the preceding month. Therefore, inasmuch as we did not receive your remittance on the 10th inst. we cancelled your contract on the 11th inst."

The last shipment of coal by defendants to plaintiff was made on January 8, after which defendants refused longer to be bound by their contract. The price of coal having advanced sharply and plaintiff being in need thereof, it made repeated demands on defendants for further shipments, all of which, however, proved unavailing. On February 10, 1910 payment for the coal shipped during the month of January was due. Plaintiff refused to make payment therefor, because, as stated, the defendants had failed to deliver any coal after January 8, 1910. In December, 1910, plaintiff brought this suit against defendants, for damages alleged to have resulted from defendants' said breach of the contract.

While several points have been raised and argued by plaintiff, yet, in our view of the case, it becomes necessary to pass upon but one controlling question, viz.:

Did plaintiff make out a prima facie case against the defendants?

Where one party commits a breach of contract, the innocent party thereto may elect to pursue one of three distinct remedies, as held in E. B. & W. I. Ry. Co. v.

Richards, 152 Ill. 59, 82:

"It is well settled that where one party repudiates the contract and refuses longer to be bound by it, the injured party has an election to pursue either of three remedies: He may treat the contract as rescinded, and recover upon quantum meruit so far as he has performed; or he may keep the contract alive for the benefit of both parties, being at all times himself ready and able to perform, and at the end of the time specified in the contract for performance, sue and recover, under the contract; or he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing."

To the same effect see: Lumber Co. v. Lumber Co., 176 Ill. App. 96; Kieper v. American Coal & Supply Co., 187 Ill. App. 131.

The undisputed evidence shows that after defendants notified plaintiff of their intention to discontinue shipments of coal to it, plaintiff demanded that the contract be fulfilled, and refused to pay for the coal delivered during the month of January unless shipments were resumed. There can be no doubt that plaintiff had elected to keep the contract alive notwithstanding defendants' notification that they would not make further shipments under it. Plaintiff, having elected to keep the contract alive for the benefit of both parties, it was necessary to perform its part of the agreement by paying for the coal delivered during January, by February 10, or if it wished to make payment by setting off its damages alleged to have been caused by defendants' refusal to ship said coal, it was incumbent upon plaintiff to have made a distinct offer so to do. (Harber Bros. Co. v. Moffat Cycle Co., 151 Ill. 84,

98.) Proof on plaintiff's part that it had substantially performed its part of the contract was essential to its right of recovery. In this, however, plaintiff has failed, and consequently it finds itself in much the same situation as were the plaintiffs in Fisher Bros. Co. v. Moffat Cycle Co., supra, wherein the court held, p. 93:

"The parties being alike in default, how can either maintain an action, upon the contract, for its breach by the other? That hinders the application of the rule in such case that potior est conditio defendentis?"

This being the settled law of this state on the question under consideration, it must be held that the trial court properly directed the jury to find the issues for the defendants.

Finding no reversible error, the judgment will be affirmed.

AFFIRMED.

283 - 21679

NEILLIE HAYES, MARY A.
HAYES and JOHN HAYES,
Defendants in error,

vs.

W. M. WHITENTON,
Plaintiff in error.

2075
ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted from a final order entered in the court below, denying the motion of plaintiff in error (defendant below) to vacate a judgment by confession, in favor of defendants in error (plaintiffs below), entered on a lease.

The only question presented for determination by this record, is whether or not the trial court was guilty of an abuse of its discretion in denying said motion. The verified petition filed by the defendant and the affidavit attached thereto, alleged as follows: That on February 20, 1915 a representative of the real estate agents who had charge of the leasing of the premises for plaintiffs, called at the home of the defendant, leaving with his wife for defendant's signature, duplicate draft leases from plaintiffs to defendant; that the said representative directed that they be executed in duplicate by defendant, who was also to furnish the names of two or more persons as references; that if said references were satisfactory his lease would be accepted and one copy thereof executed by plaintiffs and returned to defendant; that on the following day (February 21st), the said

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representative called on defendant's wife, who delivered the lease to him executed in duplicate as directed, and furnished the names of two references at which time said representative informed her that if the references were satisfactory, defendant's copy of the lease would be returned to him within ten days from that time; that this information was given defendant's wife in answer to an inquiry by her as to how long it would take before defendant would know whether or not he could have the premises; that said lease was executed and delivered to said representative on February 21st, together with the necessary references, upon the express condition that the lease should not become operative unless and until plaintiffs should be satisfied with said references, and with the further understanding that should the references prove satisfactory, one copy of said lease would be executed by plaintiffs and returned to defendant within ten days from that time; that defendant received no word from plaintiffs or their agents, nor did he receive a duplicate of the lease as agreed, within ten days; that he was not communicated with or informed whether or not he would be accepted by plaintiffs as a tenant; that upon March 15, 1915 defendant wrote plaintiffs' agents that he had concluded they were not satisfied to accept him as a tenant and that he had made other arrangements and did not want the premises in question; to which they replied that they would hold defendant liable under the lease inasmuch as they held his signed contract thereon.

Inasmuch as the foregoing facts, if true, would constitute a valid defense to plaintiffs' cause of action, we are of the opinion that the foregoing petition, together with the affidavit attached thereto was sufficient to entitle defendant to a hearing on the merits of the

case. A situation somewhat similar to that here presented, arose in McQuivern v. Parkhill, Ill. App., Gen. No. 20826, first district, wherein this court held: "The view most favorable to the defendant that can be taken of the delivery of the unsigned instruments on May 1, is that it amounted to an offer on the part of plaintiff to lease the store for two years. * * * 'An offer may be revoked or withdrawn at any time before it is accepted and acceptance communicated to the party, for, until then, there is neither agreement or consideration.' 9 Cyc. 284. * * * The signing of the instruments by defendant and retaining the same in her possession was no more than a mental assent."

We are therefore of the opinion that the court erred in denying defendant's motion to vacate the judgment. The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

MAX BRAUDE, SIMON BRAUDE
and BENJAMIN BRAUDE, trading
as BRAUDE BROTHERS,
Plaintiffs in Error.

V2.

LOUIS VEHON, trading as
LOUIS VEHON & BROTHER,
Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

By this writ of error plaintiffs in error (plaintiffs below), seek to reverse a judgment for \$55.13 rendered in their favor, against defendant in error, who was also defendant in the court below.

Prior to March 10, 1913, defendant was indebted to plaintiffs in the sum of \$1,020.50 for merchandise sold and delivered by the latter to the former. Owing to financial reverses, defendant found himself unable to meet his obligations when they became due, and appealed to his creditors to accept less than their full claims in settlement thereof, in order to avoid throwing defendant into bankruptcy. A meeting of creditors was held in Chicago, where the following composition agreement was entered into:

"Chicago, March 10, 1913.

"We, the undersigned creditors of Louis Vehon (doing business as Louis Vehon & Bro.) in the amount set opposite our respective names, do hereby agree to accept in full settlement of our claims twenty-five per cent. (25%) in cash, provided said twenty-five per cent. (25%) is paid us within thirty days from the date hereof, and we agree, upon the payment

of said twenty-five per cent. in cash, to sell, assign, transfer and deliver our said claim, without recourse, however, to us in any event, to any person designated.

"Provided all creditors agree to the above."

Then follows a list of the subscribing creditors, together with the respective amounts due them, among which is the name of the plaintiffs. An examination of the record discloses that there were two composition agreements signed by the plaintiffs, - one by the plaintiffs themselves, and the other by one Max Conheim as their agent. There is a slight difference between them, in that the one hereinabove quoted contains the clause, "Provided all creditors agree to the above," while the other contains the clause, "Providing all agree." However, this slight variance in the verbiage is of no consequence as, in our opinion, both express the same intent.

In a letter dated May 27, 1913, defendant enclosed to plaintiffs a check for \$255.13, this being the amount due plaintiffs under the foregoing composition agreement. Shortly thereafter plaintiffs' attorney returned said check with a letter wherein he insisted upon immediate settlement of the full amount, - \$1,020.50. Thereafter defendant paid plaintiffs \$200 on account, - \$100 on March 25th, and a like amount on May 4, 1914.

The court entered judgment for plaintiffs in the sum of \$55.13, this being the difference between \$255.13 and the amount paid on account by defendant to plaintiffs.

It is contended by plaintiffs that the foregoing compromise agreement was not binding upon them; first, because payment of the amount due them thereunder was not made nor tendered within thirty days from the date thereof as provided in said agreement; and, second, because all the creditors did not join therein.

The compromise agreement in question was pleaded by defendant in his affidavit of merits, as an affirmative defense. It was therefore necessary, in order to avail himself of such defense, that he prove a compliance by him, with all the provisions of said agreement. In this, defendant has utterly failed. On the contrary, the evidence shows that defendant's check for \$255.13 was not tendered to plaintiffs until May 27, 1913, - more than sixty days after the signing of the compromise agreement, which provided that payment must be made within thirty days. Furthermore, it appears from the record that only part of the defendant's creditors consented to the said compromise agreement, which required that all must agree thereto.

"A composition must be performed strictly and punctually, and any infraction of its provisions by one party will release the others from its obligation, in so far as that party is concerned." 8 Cyc. 436. "Where a debtor fails to pay the percentage stipulated for in a composition agreement within the time specified therein, the original debt is revived and the creditor may collect the entire amount." Zoeblisch v. Von Minden et al., 120 N. Y. 406, citing H. N. F. Bank v. May, 29 Hun. 404. We are therefore of the opinion that the trial court erred in entering judgment for only \$55.13 for the plaintiffs. The judgment will be reversed and judgment entered here for plaintiffs in the sum of \$820.50 plus the interest thereon from March 10, 1913, at the rate of five per cent. (5%) per annum to date, amounting to \$146.16; making a total of \$966.66.

JUDGMENT REVERSED AND JUDGMENT
HERE FOR \$966.66.

328 - 21724

FINDING OF FACTS.

The court finds as follows:

1. That defendant in error did not pay plaintiffs in error the sum of \$255.13, or any part thereof, within thirty days from March 10, 1913.
2. Defendant in error did not procure the consent of all his then creditors to the composition agreement, as therein provided.
3. That on March 10, 1913 there was due and owing the plaintiffs in error the sum of \$1,020.50, and that subsequently thereto the defendants in error paid on account thereof the sum of \$200, leaving a balance due of \$820.50.
4. That the interest on said last mentioned sum, from March 10, 1913 to date at the rate of five per cent. (5%) per annum amounts to \$146.16; making the total amount due \$966.66.

17. 10. 1958

1. 10. 1958

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17. 10. 1958

340 - 21737

ARTHUR J. DUNBAR,
Defendant in Error,

vs.

ALEXANDER EISENSTEIN and
SAMUEL EISENSTEIN, co-partners
doing business as Eisenstein
& Eisenstein,
Plaintiffs in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

By this writ of error plaintiffs in error (defendants below), seek a reversal of a judgment for \$319.18 entered in favor of defendant in error (plaintiff below), for merchandise sold and delivered by the latter to the former.

In the court below, defendants filed a counter claim for \$600, being eight months' rent alleged to be due and unpaid under a certain lease entered into by and between the parties hereto. The trial court, however, disallowed the counter claim of defendants.

The amount of plaintiff's claim is not in dispute. The point raised by defendants is, that the court erred in disallowing their counter claim which, if found valid, would have entitled them to judgment for \$280.82. Upon examination of the abstract of record filed by defendants, we find that the lease upon which defendants base their counter claim for rent does not appear therein. This court has repeatedly held that it will not go to the record to correct an abstract or to supply omissions, in order to reverse a judgment. The

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rules of this court provide that the abstract must be sufficient to fully present every error and exception relied upon. The failure of defendants to file a sufficient abstract of the instruments relied upon for a reversal, is ample justification for affirming the judgment of the court below. International Hotel Co. v. Flynn, 141 Ill. App. 532; White Oak Coal Co. v. Worthington, 186 Ill. App. 567; Lerner et al. v. Borack, 189 Ill. App. 603. However, from an examination of the entire record and from a careful consideration of all the evidence submitted, we cannot say that the finding of the court is clearly and manifestly against the weight of the evidence or that the judgment is erroneous. Accordingly the judgment will be affirmed.

AFFIRMED.

354 - 21751

FRANK P. HEILMAN and
GEORGE J. BEIRLE, co-
partners doing business as
George J. Beirle & Company,
Defendants in error,

vs.

MRS. ROSE L. KATZ and
LOUIS KATZ,
Defendants,
LOUIS KATZ,
Plaintiff in error.

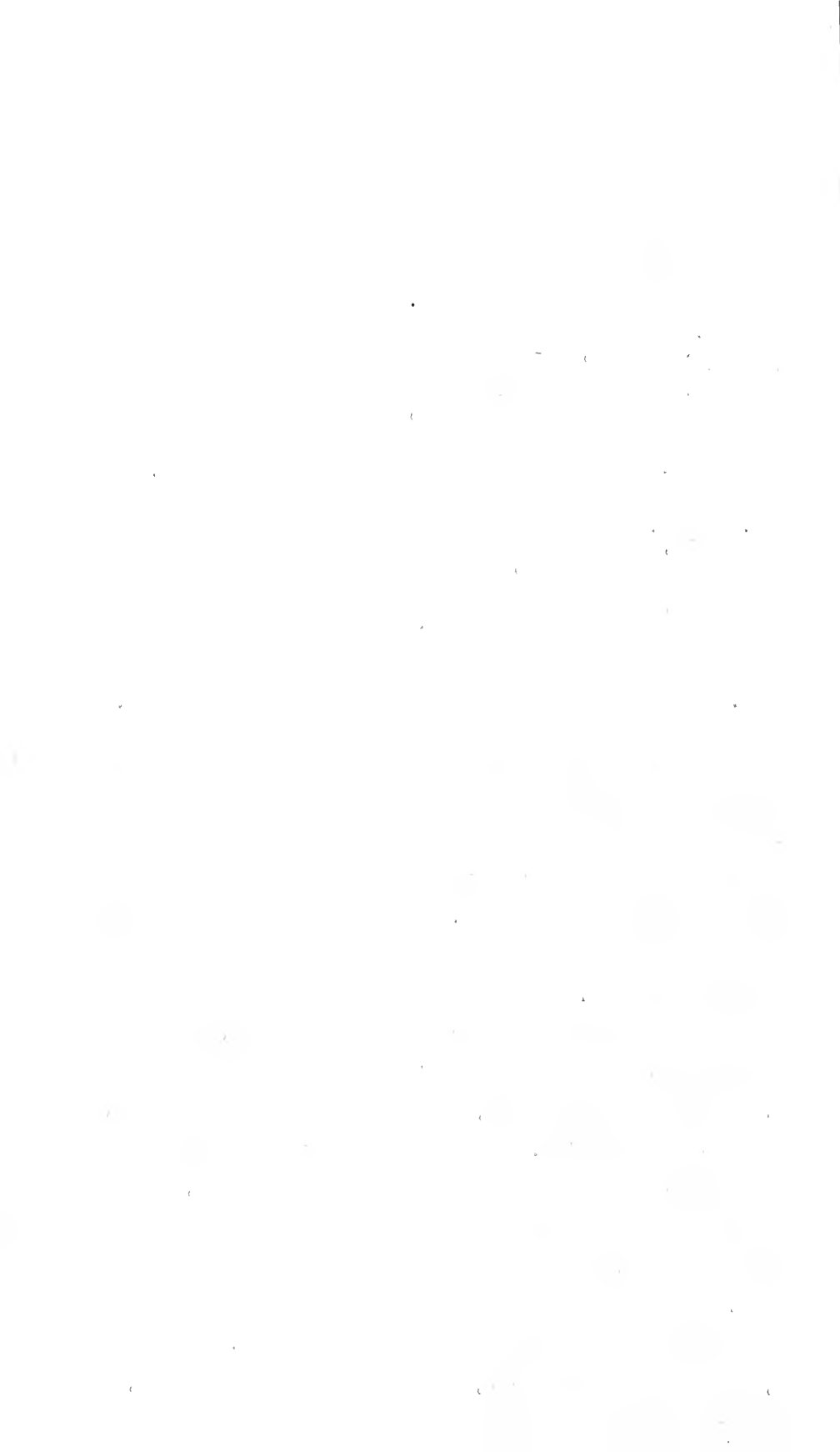
ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This writ of error brings up for review the final order of the trial court denying the motion of plaintiff in error to vacate a judgment entered by default for his failure to file a sufficient affidavit of merits within the time prescribed by the court. It is claimed that the action of the court in denying said motion amounted to an abuse of its discretion.

Defendants in error (plaintiffs below), brought an action in contract against plaintiff in error and Rose L. Katz (defendants below), for the value of certain goods, wares and merchandise. Both defendants filed a joint affidavit of merits which was afterwards (on July 2, 1915) stricken from the files and the defendants ordered to file an amended affidavit of merits within ten days from said date. After the ten days had expired each of the said defendants filed a separate affidavit of merits. On August 6, on motion of plaintiffs, due notice having been given, both of said last mentioned affidavits were stricken from

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the files and judgment was entered for the plaintiffs. Execution issued thereon and was served upon both defendants. On August 14, 1915 both defendants moved the court to quash the execution and vacate the judgment and the order striking the affidavit of merits from the files, which said motion the court denied. Subsequently plaintiff in error sued out this writ of error.

It is apparently conceded that the trial court properly struck from the files defendants' original joint affidavit of merits. The amended affidavit of merits filed on behalf of plaintiff in error was also properly stricken from the files, both for insufficiency and because it was not filed within the prescribed time.

Plaintiff in error's affidavit of merits, denying that he ordered or purchased or that plaintiffs sold him the goods in question, or that he, personally, was indebted to the plaintiffs for said goods or on an account stated, fails to meet plaintiffs' allegation that both defendants were jointly indebted to them. Rule 20 of the Municipal Court of Chicago which is in the record before us, provides as follows:

"It shall not be sufficient for a defendant in his affidavit of merits to deny generally the facts alleged by the statement of claim, but each party shall deal specifically with each allegation of which he does not admit the truth, except allegations of damages. Any denial of any allegation of fact made by the opposite party must not be evasive, but must answer the point of substance."

Plaintiff in error's affidavit of merits is violative of this rule, in that it is ambiguous and evasive and does not meet the allegations of plaintiffs' statement of claim.

For the reasons hereinabove assigned, we are of the opinion that the trial court was not guilty of an abuse of its discretion in denying plaintiff in error's said motion. Accordingly, the judgment will be affirmed.

APPROVED,

The first of these is the fact that the
entire system is now being re-examined
and revised, and it is expected that
the results of this examination will be
made known to the public in the near
future.

The second of these is the fact that the
entire system is now being re-examined
and revised, and it is expected that
the results of this examination will be
made known to the public in the near
future.

The third of these is the fact that the
entire system is now being re-examined
and revised, and it is expected that
the results of this examination will be
made known to the public in the near
future.

420 - 21818

NELLIE B. FRAME,
Appellee,

vs.

HARDER'S FIREPROOF
STORAGE & VAN COMPANY,
Appellant.

APPEAL FROM

COUNTY COURT,

COCK COUNTY.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

The judgment herein complained of was rendered in favor of appellee (plaintiff below), against appellant (defendant below), for the alleged conversion of a piano.

The piano in question was purchased by plaintiff from the Thompson Music Company, the original purchase price being \$475.00. Plaintiff gave in exchange as part payment, a secondhand piano, for which she was allowed a credit of \$150.00; the balance of \$325.00 was payable at the rate of \$10.00 per month, and was evidenced by a note duly executed. About four years later another note, secured by a chattel mortgage on said piano, was executed by the plaintiff in favor of the said Music Company, for a lesser sum, - presumably the unpaid balance of the purchase price at that time. Later on plaintiff stored said piano in the defendants' warehouse for safekeeping. A short time thereafter a representative of the said Music Company, the mortgagee, called on defendant and presented its chattel mortgage on the property in question, and insisted that by reason of plaintiff's default in the payments, the Music Company was entitled to the possession

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thereof under its chattel mortgage, and thereupon the defendant surrendered the said piano to the Music Company. Subsequently said Music Company sent into the hands of a receiver, following which this suit was brought by plaintiff against defendant as bailee, for the wrongful conversion of the property in question.

It is urged by defendant as a ground for reversal, that it was justified in surrendering said instrument to the Music Company, because the latter was lawfully entitled to the possession thereof under its chattel mortgage.

Section 249 of our act relating to Railroads and Warehouses, ch. 114, R. S. of Illinois, provides inter alia that a warehouseman is justified in delivering the goods to one who is . . . "The person lawfully entitled to the possession of the goods, or his agent." The question then arises, Was the said Music Company entitled to possession of the property which is the subject of this litigation, by reason of having a paramount title thereto?

The chattel mortgage given by plaintiff to the said Music Company provided inter alia that the plaintiff might retain possession of the property until she should make default in the payments of money therein specified, in which event the entire balance was to become immediately due and payable, and the mortgagee should have the right to repossess itself of the property without notice to the mortgagor (plaintiff).

The undisputed evidence shows that plaintiff was in default of her payments at the time of the surrender by defendant of the instrument in question to the Music Company. Therefore, under the terms of the chattel mortgage hereinabove referred to, the Music Company was

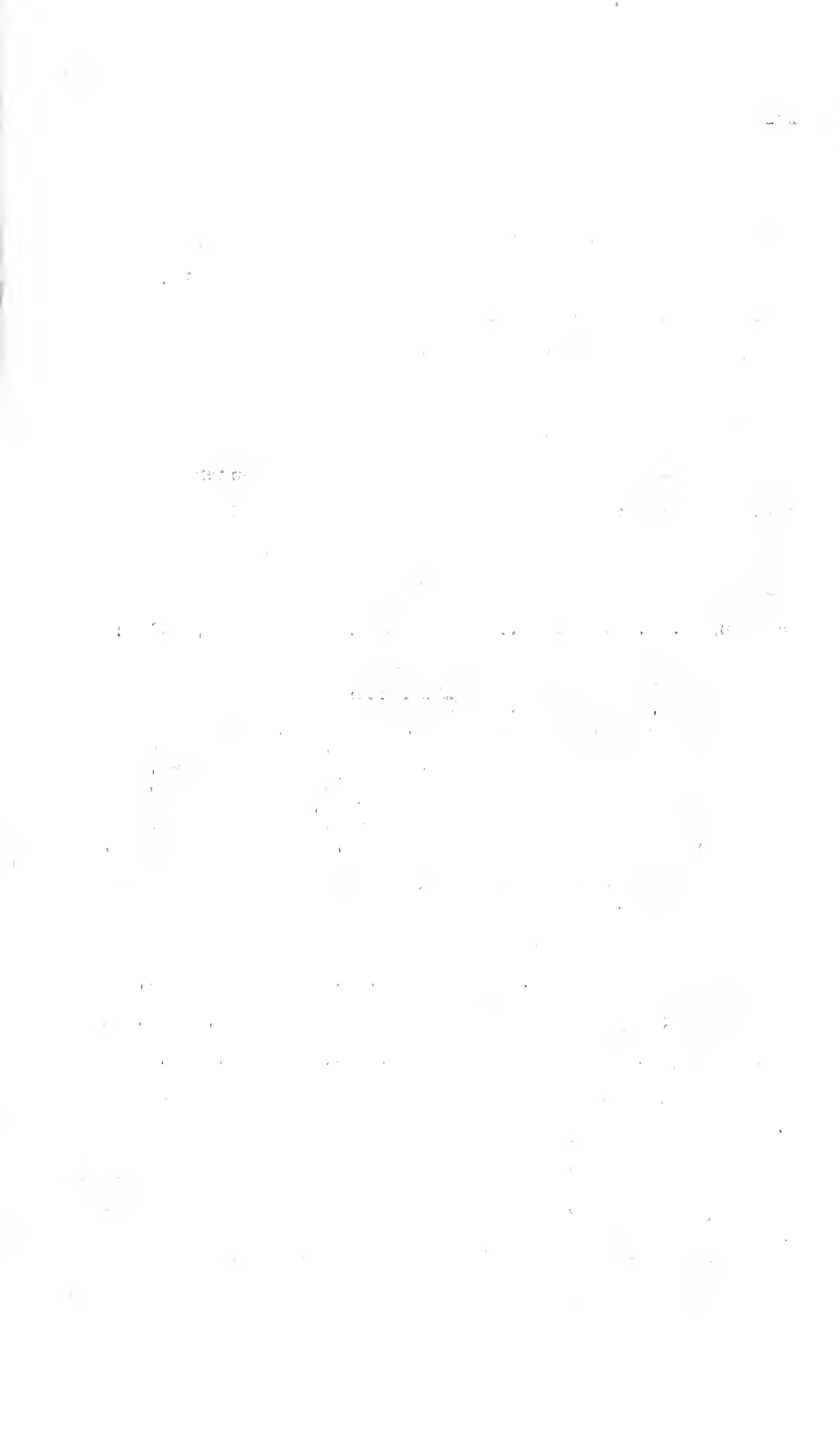
entitled to the possession of the piano in question, under a title which was paramount to that of the plaintiff's. While it has been universally held that a bailee may not dispute the bailor's title to the bailment, yet one exception to this well settled rule of law is, that where the bailee has surrendered the bailment to one holding a paramount title thereto, he may plead such surrender as a valid defense to an action against him by the bailor for a conversion of the property, the burden being upon the bailee to prove such paramount title in the third person. In Young v. N. A. Ry. Co., 80 Ala. 100, it was held, p.102:

"The general rule is that the bailee is not permitted to set up a jus tertii, or title of a third person, in himself. But where the bailor has no valid title, the bailee may, on demand, deliver the goods bailed to the rightful owner, and this would be a good defense to an action brought by the bailor, the onus being on the bailee to establish the defense. * * * The reason of this rule is, that the bailee of the goods can be in no better situation than the bailor from whom he received them, and the true owner, or other person entitled to their custody and having a special property in them, can sue either the bailor or bailee, and recover from them. And no man shall be rebuked by the law for doing what the law would compel him to do."

To the same effect are : Mudd et al. v. Montanye et al., 38 Wis. 511; Western Transportation Co. v. Barber, 56 N. Y. 544; Thomas v. Northern Pacific Exp. Co., 73 Minn. 185.

In view of the undisputed evidence that the plaintiff was in default, under the terms of the chattel mortgage under which the Music Company claimed the right of possession, we are impelled to the inevitable conclusion that the verdict of the jury finding the issues for the plaintiff, is clearly and manifestly against the weight of the evidence. Accordingly the judgment will be reversed with a finding of facts.

REVERSED WITH FINDING OF FACT.



FINDINGS OF FACTS.

This court finds as facts:

That appellee was in default of her payments under the terms of the chattel mortgage under which the mortgagee, the Thompson Music Company, claimed the right to the possession of the piano that was the subject of the alleged conversion, at the time of the surrender thereof by appellant, the Harder's Fireproof Storage Van Company; and at the time of the surrender of the said piano to the said mortgagee by the appellant, the said mortgagee had a title thereto which was paramount to that of the appellee; and that the mortgagee at said time was entitled to the possession thereof.

30 - 21266

JOSEPH KAUFMAN and WILLIAM
BERNSTEIN, trading as JOSEPH
KAUFMAN and COMPANY,
Plaintiffs in Error,

vs.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

CHICAGO, INDIANAPOLIS & LOUIS-
VILLE RAILWAY COMPANY, a
corporation,
Defendant in Error.

MR. JUSTICE MCGOORTHY DELIVERED THE OPINION OF THE COURT.

This is a writ of error to the Municipal Court of Chicago to reverse a judgment of that court in favor of defendant (defendant in error here), in an action by the plaintiffs for the wrongful detention by defendant of a car of potatoes consigned to, and alleged to be owned by, the plaintiffs.

Before the plaintiffs had presented all of their testimony and rested their case, the court over the objection of plaintiffs' counsel, entered a finding and judgment in favor of defendant. The testimony offered by plaintiffs and excluded by the court included a bill of lading issued by defendant showing the potatoes in question were consigned to plaintiffs. Such bill of lading tended to show ownership in plaintiffs, and was competent and material to the issues. The court should have permitted plaintiffs to have completed proof of their case, as there was no evidence at the time the court entered its finding for defendant, that plaintiffs had no cause of action. The right of a plaintiff to submit

proof in support of the allegations in his pleadings requires no citation of authority.

Because of the refusal of the court to receive said bill of lading in evidence, the judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

IDA MARK,
Defendant in Error,

vs.

ROBERT MITCHELL,
Plaintiff in Error.

Error to

Municipal Court
of Chicago.

MR. JUSTICE MCGOERTY DELIVERED THE OPINION OF THE COURT.

Ida Mark (defendant in error) brought suit against defendant (plaintiff in error) for money had and received. The case was submitted to the court without a jury, resulting in a finding and judgment in favor of plaintiff for \$390 and costs. Plaintiff's testimony tended to show that she had loaned to defendant divers small sums of money, aggregating the sum of \$450, of which sum \$390 remained unpaid. Ida Marks, the plaintiff was formerly employed by defendant and during such employment defendant sustained illicit relations with her. Defendant denied that he had borrowed money from plaintiff, but testified that he had given her about \$300 as "hush money". The court refused to permit defendant to show the financial condition of his business tending to prove that it was improbable that defendant borrowed money from plaintiff. Such testimony was competent and material to the issues, and its exclusion, in view of the most unsatisfactory character of plaintiff's testimony, constituted reversible error. The court also admitted in evidence two certain promissory notes drawn by plaintiff, but not signed by defendant. These notes were self serving declarations of plaintiff and should not have been

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received in evidence.

For the reasons herein set forth the judgment
of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

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Error,)
Error.)

This case comes before this court on a writ of error to review the correctness of a judgment entered by the Municipal Court of Chicago against the plaintiff in error.

The sole ground relied upon for reversal of said judgment was the denial by the presiding judge of said court, of plaintiff in error's petition, duly verified by affidavit, for a change of venue. The petition could not become a part of the record unless preserved by certificate of evidence or bill of exceptions. This course was not pursued, and the petition is not before us. Heacock v. Hosmer, 109 Ill. 245. The judgment of the Municipal Court is therefore affirmed.

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189 - 21582

THE COMPLETE ARTIFICIAL
STONE CO., a corporation,
Defendant in Error,

vs.

ANGELINE DYNIEWICZ and
CASIMIR W. DYNIEWICZ,
Plaintiffs in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MCGOORTY DELIVERED THE OPINION OF THE COURT.

In this case judgment on finding for \$700.00 was entered in the Municipal Court of Chicago against plaintiff in error. Motion for change of venue was made in due form by plaintiff in error and not allowed by the court, which ruling is assigned as reversible error. The motion for a change of venue should have been allowed. Feigen v. Shaeffer, 256 Ill. 493. The judgment of the Municipal Court of Chicago will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

207 - 21601

THE FIRST NATIONAL BANK OF
ALLEGAN, MICHIGAN,
Defendant in Error,

vs.

THE CHICAGO SANITARY RAG
COMPANY, a corp.,
Plaintiff in Error.

APPEAL TO

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MCCORTY DELIVERED THE OPINION OF THE COURT.

Suit was commenced in the Municipal Court of Chicago by defendant in error, resulting in a finding and judgment against plaintiff in error (defendant below) in the sum of \$812.82. The defendant seeks to reverse said judgment because of the failure of the trial judge to grant defendant a continuance of the case upon defendant's motion, supported by affidavit (presented May 3, 1915, the day on which the case proceeded to trial) setting forth that A. M. Goldberg, President of the defendant company, was an important witness for defendant, that there was a good defense to the suit as set out in the affidavit of merits, and that said Goldberg could substantiate the allegations therein if he were present. The affidavit further set forth that said Goldberg was then in Madison, Wis., and that he would not be able to return to Chicago to testify until May 5, 1915; that the said Goldberg was a party interested in the transactions sued for by the plaintiff, that he had sole charge of the matter; that his testimony was material and important, and that without the said Goldberg, defendant would be greatly prejudiced in its rights. The affidavit

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5. The fifth part of the report is devoted to a detailed analysis of the cultural situation in the country.

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10. The tenth part of the report is devoted to a detailed analysis of the administrative situation in the country.

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17. The seventeenth part of the report is devoted to a detailed analysis of the musical situation in the country.

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19. The nineteenth part of the report is devoted to a detailed analysis of the cinematographic situation in the country.

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26. The twenty-sixth part of the report is devoted to a detailed analysis of the museum situation in the country.

does not set forth the particular facts to which the witness would have testified if present at the trial. It is alleged in the affidavit that "Goldberg, who signed the affidavit of merits, can substantiate the matters therein contained if present", but the affiant does not state therein that the witness, if present, would testify to the specific facts set forth in the affidavit of merits. Neither does the affidavit show any diligence on the part of the defendant to procure the attendance of the witness, Goldberg. The affidavit fails to make such showing as is required by the statute, and hence the action of the trial court was not an abuse of discretion. The judgment of the Municipal Court of Chicago will therefore be affirmed.

JUDGMENT AFFIRMED.

277 - 21673

MICHAEL KRAMP et al.,
Plaintiff in error,

vs.

L. W. THEXTON et al.,
Defendants in error.

APPEAL TO

SUPERIOR COURT

OF COOK COUNTY.

MR. JUSTICE MCGONAGHY DELIVERED THE OPINION OF THE COURT.

This case has been before this court in the case of Kramp v. Kramp, 103 Ill. App. 464, upon an appeal by Louis Thexton, defendant in error here, and his wife, from a decree of sale of certain real estate situated in Chicago, Ill., entered by the Superior Court of Cook County on July 19, 1912, under a bill to foreclose a second mortgage of \$17,000 brought by Michael Kramp and Edwin L. Gaugh, trustee, as complainants, against John Kramp, the two Thextons and others as defendants. Said decree of sale was affirmed by this court. The real estate in question, subject to a first encumbrance of \$24,000 was then sold by the master, in accordance with said decree of sale, to Michael Kramp, plaintiff in error here, for \$15,300, resulting in a deficiency of \$4798.29. On July 17, 1914, one of the Judges of the Superior Court of Cook County, entered an order approving said sale, and finding Louis Thexton personally liable for such deficiency and entered a personal judgment therefor against him and John Kramp, the maker of the encumbrance then being foreclosed, for \$4798.29.

On July 31, 1914, during the same term of court, the foregoing order was upon motion of Louis Thexton, amended and modified by order of another judge of said court, as follows:

"This cause coming on to be heard upon the motion of the defendant, Louis Thexton, to vacate and set aside the deficiency decree against said Louis Thexton entered in this cause on July 17, 1914.

And it appearing to the court that there is nothing in the bill of complaint, report to the master, the evidence preserved in the record and the master's report of sale, or in the record upon which to predicate a personal decree against said Louis Thexton, for the deficiency shown in the master's report of sale.

It is therefore adjudged and decreed that the judgment and decree against Louis Thexton for a deficiency in the sum of \$4,798.29, and the order for execution thereon against him entered in this cause at this term on the 17th day of July, 1914, be and the same is hereby vacated, set aside and for naught esteemed, as to said Louis Thexton; the decree otherwise to remain in full force and effect."

It is sought to reverse the modified order or decree upon the grounds, (1) that one branch of the Superior Court has not the jurisdiction to sit as a reviewing court upon the decree or judgment of another branch of the same court; (2) that the defendant, Louis Thexton, is personally liable on the mortgage foreclosed and therefore liable for the amount of such deficiency decree as shown by the record in the case.

This practice is too well settled to be questioned, that the Superior Court has the discretionary power, at any time during the term at which an order or decree in a cause has been entered, whether it be interlocutory or final to vacate and set it aside, for such cause as may be necessary to promote justice. Molton v. McKinley, 22 Ill. 203, 204. The record before us shows that Louis Thexton, defendant in error, took the real estate subject to the encumbrances and

did not assume them. Plaintiff in error can only establish the liability of defendant in error by proving a contract to assume and pay the debt, or some part of it. Siegel v. Borland, 191 Ill. 107. No such contractual relation has been shown between the parties. There is no allegation in the original bill of complaint, and no finding prior to the decree of sale of any personal liability as to defendant in error. The modified decree is therefore affirmed.

DECREE AFFIRMED.

292 - 21688

THE STAG COMPANY, a
corporation,
Plaintiff in Error,

vs.

UNION BANK OF CHICAGO,
a corporation,
Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

Plaintiff in error brought suit against the Union Bank of Chicago. The plaintiff in its statement of claim set forth that on Jan. 30, 1915, it drew its certain check upon the defendant bank for \$100.00, payable to the order of S. R. Danziger, dated Feb. 10, 1915; that on Feb. 7, 1915, the plaintiff directed the bank to stop payment on said check, but that on Feb. 2, 1915, said check had already been paid through the Chicago Clearing House and that as a result thereof plaintiff was damaged to extent of \$100.00.

The defendant in its affidavit of merits stated that the plaintiff, prior to the commencement of suit, recovered from said Danziger the full amount of said check, and consequently plaintiff was not damaged by the alleged default of defendant in paying same.

A jury was waived and a trial had, resulting in a finding and judgment for plaintiff in the sum of \$30.00. Plaintiff contends that the court erred in not entering a finding and judgment for plaintiff for \$100.00.

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S. H. Danziger, the payee of the check in question was in the employ of plaintiff when said check was issued to him. The sole defense interposed by the bank was that plaintiff had subsequently received \$70.00 in money and merchandise from Danziger, thereby reducing its loss on said post dated check to \$30. The evidence tends to show that Danzinger on Jan. 30, 1915, received another check from plaintiff for \$100.00, which was not post dated, and which was paid by the bank in due course, John Gulliksen, cashier of the defendant bank, testified that Harry L. Marks, secretary and treasurer of plaintiff, called at defendant's bank on Feb. 7, 1915, and instructed him and said bank to stop payment on said post dated check, and was thereupon informed by the cashier that said check had already been paid by defendant, and that several days thereafter, Marks told him that he received \$70.00 from Danziger and that there was not much lost to plaintiff on said check. Marks testified that in his conversation with defendant's cashier he at all times referred to the entire sum of \$200.00 (the amount of the two checks given by plaintiff to Danziger) and referred to the \$70.00 paid plaintiff by Danziger as the sum realized by plaintiff on Danziger's entire indebtedness to it of \$200.00. It is not contended by defendant that Danziger directed defendant as to the manner in which the payment of \$70.00 should be applied on his indebtedness to defendant, and, in the absence of such direction, defendant had the right to apply such payment on Danziger's total indebtedness of \$200.00 Kock et al v. Roth, 150 Ill. 212, 226. The bank having negligently paid said post dated check prior to its date, should be required to save plaintiff harmless from

resultant loss. The finding and judgment of the Municipal Court of Chicago is therefore reversed, and a finding here of the issues for the plaintiff and judgment thereon for \$100.00.

REVERSED WITH A FINDING OF FACT.

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292 - 21688

FINDING OF FACT.

We find that the \$100.00 paid by the defendant in error, Union Bank of Chicago, Feb. 2, 1915 on the post dated check issued by plaintiff in error, The Stag Company, Jan. 30, 1915, dated Feb. 10, 1915, is a complete loss to plaintiff in error.

310 - 21706

STANLEY DRANICKI,
Defendant in Error,

vs.

JULIAN B. OGLOZINSKI,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MCGOORTY DELIVERED THE OPINION OF THE COURT.

Defendant in error (plaintiff below) recovered a verdict and judgment in the Municipal Court of Chicago against plaintiff in error for \$394.80. It is assigned as error that the verdict is against the manifest weight of the evidence. The question of fact argued by counsel is, did the plaintiff work for defendant under a contract entered into between them, or did plaintiff assume a certain contract entered into between defendant and plaintiff's father? There is no bill of exceptions or stenographic report before us. The record presented contains what purports to be a statement of facts which is incomplete, and insufficient to enable us to say that the verdict is against the manifest weight of evidence. The judgment of the Municipal Court of Chicago will therefore be affirmed.

JUDGMENT AFFIRMED.

571

529 - 20862

H. and A. ISHAKISTAN, a Co-partnership,
doing business as GRANT SORPS PAID.

Appellees.

vs.

UNITED STATES CASUALTY COMPANY,
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUDGE O'CONNOR delivered the
opinion of the court.

Appellees brought an action against the appellant
on a burglary insurance policy and recovered a judgment for
\$839.16, to reverse which this appeal is prosecuted.

One of the conditions of the policy was that no
recovery could be had on account of any loss, "if the
accounts and records of the assured are not so kept that
the actual loss may be accurately determined therefrom."
The trial court found that the loss could be ascertained
from the accounts and records as kept by appellees.

The only contention made by appellant in its
original brief and argument is that the loss could not be
determined from such accounts and records. There is no
objection that the amount of the judgment was not the
amount of the loss. The evidence on which the amount of
the loss is based is not abstracted. In appellant's reply
brief the contention is first made in this court that the
evidence is insufficient to sustain the amount of the
judgment. It is elementary that such contention cannot be

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first made in the reply brief. I. C. R. R. Co. v. Heisner, 45 Ill. 143; Schumacher v. Bell, 164 Ill. 181; Morton v. Fussy, 237 Ill. 26; Wetmore v. Henry, 259 Ill. 80.

Appellant argues that the finding of the trial court that the loss could be ascertained from the accounts and records is not sustained by the evidence; that the evidence shows that the loss could not be so determined; that the testimony of appellees taken in connection with the cash book and ledger, which are before the court, demonstrate the truth of appellants contention. The evidence tends to show that appellees kept a ledger, cash book, check book, invoices, sales slips and an inventory, the latter being made some months before the burglary was committed, and one of appellees testified that from these, the amount of loss could be determined. The inventory, invoices, sales slips and check book are not in the record. We are therefore unable to say that the finding of the trial court, based upon all the evidence introduced on the trial, is not supported by the evidence. Furthermore, as the amount of the judgment is not disputed in this court, appellant cannot escape liability under the condition in respect to accounts and records. That condition is intended to protect appellant against an excessive claim, and is not available to defeat a claim, the amount of which is not in dispute. Licman v. Metropolitan Surety Co., 111 N.Y. Supp. 536.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

374 - 21360

JOHN SULLIVAN and MARGARET
SULLIVAN,

Appellees,) APPEAL FROM

vs.

SUPERIOR COURT,

CATHOLIC ORDER OF FORESTERS,

COCK COUNTY.

Appellant.)

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Appellees brought suit against the appellant, a fraternal insurance society, to recover upon a benefit certificate for \$1000, issued by appellant to Timothy Sullivan, son of appellees, and payable upon the death of the insured to appellees. There was a trial before the court, a jury having been waived, and a judgment for \$1293.16 entered in favor of appellees, to reverse which appellant prosecutes this appeal.

Appellant contends that the finding of the trial court is against the manifest weight of the evidence, and that the judgment should therefore be reversed. It is argued that the insured, Timothy Sullivan, gave a false answer to appellant's medical examiner at the time he sought admission into the society. The question and answer are as follows: "When and for what has medical advice been sought within the last three years? Nothing." It is insisted that the answer was false, in that the uncontradicted evidence shows that the insured was treated for a physical ailment by Dr. Clark in October, 1907, and that he had also been treated prior to that time and during the year 1907 by Dr. Storey; that the false answer was made

in the application of Sullivan, the insured, March 25, 1908, and the application was incorporated into and made a part of the contract. The application contained the following: "I do hereby certify and declare that the answers given by me to the above questions are each and all true in fact, and I do hereby warrant said answers and each one of them to be true in fact, and I do hereby agree that, should any answers so made by me be untrue in fact, that then, and in such case, I do hereby forfeit the rights of myself and of my beneficiary or beneficiaries and any and all other persons whomsoever to any and all benefits and privileges of the Order, including all claims and demands by virtue of any benefit certificate that may have been issued to me by said Order, including all moneys paid by me to said Order for any purpose whatsoever. TIMOTHY SULLIVAN." In the benefit certificate it was provided that "the representations made and subscribed by him in the application and medical examiner's blanks and the answers given and certified by him to the medical examiner are hereby acknowledged and declared by him to be warranties and to be made a part of this contract." The appellant, therefore, contends that as the answer of the insured was a warranty and being false, it avoided the contract whether such answer was material.

Appellees contend that the insured did not give a false answer to the question, but that the medical examiner did not write down the answer as given.

The evidence tends to show that in 1907, Dr. Storey, at the request of the insured, called at his home on three different occasions and treated him for illness due to excessive use of intoxicating liquor; that afterwards in October or November of the same year Dr. Clark treated the insured who was again suffering from the excessive use of liquor. No



evidence was introduced to dispute this. Evidence was introduced by the appellees, however, that tends to show that at the time the insured went to the office of the medical examiner he was accompanied by two other applicants and the Chief Ranger of the local court; that the three applicants were examined on the same evening, the time required for the examination of the three being about 35 or 40 minutes; that the Chief Ranger was in the private office of the medical examiner at the time of the examination and heard the examiner ask the question: "When and for what has medical advice been sought within the last three years", and heard Sullivan reply that he had been attended by a doctor; that Sullivan mentioned the name of Clark, but whether he stated Clark was the doctor the witness did not recollect; that the three applicants examined on that occasion were also initiated into the society on the same evening on a subsequent date. The medical examiner testified on behalf of appellant that he examined the three applicants, and that during the examination of Sullivan no one was in the private room except himself and Sullivan; that he wrote down the answers as given; that he had no independent recollection of the questions or answers; that he did not recollect Sullivan and had no independent recollection of the matter at all other than that the answers appeared in his handwriting. The application contains about 87 questions and answers, and the examiner stated that he did not propound all of them to the insured, but only such as were necessary, although all of the questions appear to be answered. The application is dated March 25, 1908, and those of the other applicants March 29th and April 1, 1908 respectively. The evidence also tends to show that Sullivan was initiated into the society April 1, 1908, and the other two April 8, 1908.

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In Sullivan's application it is stated he was born in 1878, and in answer to a question as to when he had been vaccinated, the examiner wrote the answer, 1872. It further appears from the evidence that at the time of Sullivan's examinations there was a contest on between the various local courts of the appellant society, and that each of these courts was trying to secure the largest number of new members in the shortest time. Sullivan, at the time of the examination, was about thirty years old, was a plasterer by trade, and worked steadily at his occupation. He was a football player and appeared to be strong and healthy.

The evidence as to whether the answer made by Sullivan to the question as to when and for what medical advice had been sought within the last three years was true or false, was conflicting. If the question was answered truthfully, but the examining physician made a mistake in writing down the answer, the right to recover on the certificate would not be defeated. Walsouth v. Supreme Tribe of Ben Hur, 292 Ill. 541; Royal Neighbors of America v. Bowman, 177 Ill. 27; Turner v. Modern Woodmen of America, 166 Ill. App. 401. We have carefully examined all the evidence in the record, and are unable to say that the finding of the trial court, who saw and heard the witnesses, is manifestly against the weight of the evidence. The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.



383 - 21370

G. M. NELSON,

Appellee,

vs.

THE HEMLOCK COMPANY,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Appellee brought suit in the Municipal Court of Chicago against appellant and recovered a judgment for \$1316, to reverse which this appeal is prosecuted. The parties will hereinafter be designated plaintiff and defendant as in the court below.

February 26, 1913, plaintiff was employed by the defendant for a period of two years at a salary of \$35 per week and certain bonuses. The defendant was engaged in the publication of a newspaper, and plaintiff was in charge of the circulation department. He entered upon his duties March 6, 1913, and was discharged by the defendant July 11, 1913. This suit was brought by plaintiff October 8, 1913, to recover for damages for a breach of the contract. The case was reached for trial November 27, 1914, and plaintiff recovered damages up to the date of the trial.

The defendant contends that it was justified in discharging the plaintiff on the ground that he failed to perform his duties as required by the contract of employment; that plaintiff was incompetent, inefficient and indolent, and



therefore was rightfully discharged. The question whether plaintiff performed his duties as required by the contract was a controverted question of fact for the jury, the evidence being conflicting. The jury were instructed that if they believed from the evidence that plaintiff was incompetent to perform the duties for which he was hired, that would be sufficient grounds for his discharge. No complaint is made that the jury were not properly instructed. They found the issues for the plaintiff, and after a careful examination of all the evidence we cannot say that the verdict is manifestly against the weight of the evidence.

The defendant next contends that plaintiff's suit was brought to recover salary and commissions on the theory that the contract was still in force and effect, and not to recover damages for a breach of the contract, and therefore it was error to include any damages accruing after the suit was brought. This contention is based on a misapprehension.

Plaintiff's statement of claim is based on a breach of the contract, and under the facts in this case, ^{the} it is only action which can be maintained. (Doherty v. Schipper & Block, 230 Ill. 123. As soon as the breach occurred, he was entitled to maintain an action for all damages which had accrued or might thereafter accrue by reason thereof; this necessarily includes loss up to the date of trial. Doherty v. Schipper & Block, *supra*; Mount Hope Cemetery Ass'n. v. Weidenmann, 139 Ill. 67.

Finding no reversible error in the record, the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.



390 - 21377

MARY KABER, Administratrix of the
Estate of Frank Kaber, Deceased,
Appellee,
vs.
HARRIET B. BORLAND,
Appellant.)
APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE O'SULLIVAN delivered the
opinion of the court.

Appellee brought this suit against appellant
to recover damages for the death of Frank Kaber which,
it was charged, was due to appellant's negligence. On
the trial in the Superior Court, at the close of the
evidence offered by appellee, the court refused to in-
struct the jury to find the issues for the appellant.
No evidence was offered by appellant, and the case was
submitted to the jury on the evidence offered by appellee.
The jury returned a verdict for \$3000 in favor of appellee
on which judgment was entered, to reverse which appellant
prosecutes this appeal.

Appellant urges several reasons why the judgment
should be reversed, but in the view we take of the case,
it will be necessary to discuss but one of these.

Appellant contends that the undisputed evidence
offered by appellee conclusively shows that the deceased,
Frank Kaber, at the time he received the fatal injuries, was
not in the exercise of ordinary care for his own safety --
that he was guilty of contributory negligence. On the
other hand appellee contends that the evidence does not

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2. <i>Curculionidae</i>	10	10	10
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81. <i>Chrysomelidae</i>	10	10	10

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1. *Journal of the American Medical Association*, 1997; 278: 1039-1044.

... ..

show that the deceased at the time in question was guilty of contributory negligence, but that the question was one to be determined by the jury from the evidence; and furthermore, that even if the deceased was guilty of such negligence, that fact would constitute no defense in this case.

[The evidence tends to show that the deceased was a bright boy between 14 and 15 years of age; that appellant owned and maintained a building in Chicago, which was nine stories in height and occupied by 10 or 12 tenants. The deceased was employed as a delivery boy for one of the tenants occupying the fourth floor of the building. The rear of the building faced an alley, and extending along the rear of the building was a platform about three and one-half feet wide and four feet high. A freight elevator which was used by the various tenants and was operated and controlled by appellant, opened on this platform. This opening into the elevator shaft was about seven and one-half feet wide and was closed by two iron doors extending horizontally across the same. The doors operated up and down, coming together in the middle. By pushing the lower door down the upper door would rise. These doors were fastened together on the inside by rods or latches, and could not be opened from the outside except by pressure in the center, which would release the rods or latches. From the platform on the outside, the position of the elevator could not be ascertained except by opening the doors and looking up or down the shaft. There was a push button at the side of the opening which operated a signal or buzzer inside of the elevator, and served to notify the operator that the elevator was wanted at the platform.

The deceased had been in the employ of one of the

tenants on the fourth floor for two or three weeks prior to the accident, and had ridden up and down in the elevator in the performance of his duties several times each day. Just prior to the accident he went down on the elevator with a delivery cart to the platform. Afterwards he returned with some castings on the cart. The elevator stopped at the platform but he was unable to get in on account of its being loaded. The doors were closed and the elevator ascended to the seventh floor. The signal then indicated to the operator that the elevator was wanted at the fourth floor and also in the basement, which was some 18 feet below the platform or first floor. The deceased, who was waiting on the platform for the car, struck his head between the doors, into the elevator shaft and as he did so the car descending struck his head, and he was killed instantly. There was testimony, by a witness who was in the basement of the bottom of the elevator shaft, to the effect that he saw the doors opening on the platform and the deceased put his head through the opening in the doors and look up in the elevator shaft; that before he could warn the deceased of his danger he was struck by the car.

The evidence also tends ^{ed} to show that the latches or rods fastening the two doors together were out of repair and out of position; that ^{not in} ~~whether~~ the latches or rods were in position the doors remained closed unless forced apart.]

In our opinion the evidence conclusively shows that the accident would not have happened had the deceased been in the exercise of ordinary care for his own safety, and even if appellant was negligent, as there is no claim of willful or wanton negligence, no recovery can be had.

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Cullen v. Higgins, 216 Ill. 78; Block v. Swift & Co., 161 Ill. 107.

Appellee, however, contends that the case of Mueller v. Phelps, 252 Ill. 630, in which a verdict for the plaintiff was sustained, is similar in all respects to the case at bar. In that case the plaintiff testified that he desired to use the elevator going into the basement; that he raised the door and put his head into the elevator shaft to ascertain the location of the elevator; that as he did so he was struck on the head by the descending elevator. The injured person there, however, was doing his work in the ordinary and only way in which it was possible. There was no person operating the elevator, but each one desiring to use it operated the car himself, and it was necessary for him to first locate the elevator before it could be brought to the proper floor. In the case at bar there was an operator in charge of the elevator, and a person desiring to use it could notify the operator by proper signals, without looking into the shaft.

Appellee further contends that even if the deceased at the time in question was guilty of contributory negligence, this would be no defense, for the reason that the evidence showed that appellant had violated the provisions of an ordinance in failing to keep the rods or latches of the door opening into the shaft in proper condition -- that contributory negligence is no defense to an action based on the violation of a statute or ordinance. To sustain this contention appellee cites the cases of Cartersville Coal Co. v. Abbott, 181 Ill. 495; Kellyville Coal Co. v. Strine, 217 Ill. 516; Mertens v. Southern Coal Co., 235 Ill. 540; and Peebles v. O'Gara Coal Co., 239 Ill. 370. In each of these

cases suit was brought to recover for personal injuries resulting from willful violation of the statutory duties prescribed for the protection of miners, enacted in obedience to the constitution of this state, and it was held that contributory negligence on the part of the person injured was no defense. These cases are not in point, and we are clearly of the opinion that appellee could recover only by proving that the deceased at the time in question was in the exercise of ordinary care for his own safety. Block v. Swift & Co., supra.

As there can be no recovery in this case, the judgment of the Superior Court will be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT: We find that at the time the deceased, Frank Kaber, received the fatal injuries, he was not in the exercise of due care and caution for his own safety, but that he was guilty of negligence which directly contributed to such injuries.



415 - 21402

ELLA MILLER, Administratrix of the
Estate of James H. Miller, Deceased,
Appellee,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant.)
APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR delivered the
opinion of the court.

The proceedings in this case were instituted
under the workmen's compensation act of 1913, by appellee
who sought to recover from appellant for the death of her
husband, who, it is claimed was killed by being struck
by a train on appellant's road. The proceedings had under
said workmen's compensation act resulted in an award by
the Industrial Board to appellee. Afterwards appellant
brought the record to the Circuit Court of Cook County
by a common law writ of certiorari to review the proceed-
ings before the Industrial Board. Appellee moved that
the writ be quashed and the petition dismissed. The
motion was sustained and an order entered quashing the
writ and dismissing the petition. To review said order
this appeal is prosecuted.

It appears that, at the time the deceased met
his death, he and appellant were engaged in interstate
commerce. Appellant's contention is that the proceedings
before the Industrial Board and the court were without
jurisdiction; for the reason that the right of appellee and
the liability of appellant, under the facts, are governed,
controlled and fixed by the statute of the United States

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commonly known as the Federal Employer's Liability Act. From an examination of the record it appears that appellee's contention was that the federal act only covered cases resulting in whole or in part from the negligence of any of the officers, agents or employees of appellant, or by reason of any defect or insufficiency, due to its negligence, in its cars, etc.; that the question of negligence did not enter into the case, and therefore the provisions of the workmen's compensation act of 1913 apply. This seems to have been the view adopted by the trial judge.

At the time this case was decided in the Circuit Court, the point in controversy had not been passed upon. Subsequently, however, our supreme court, in the case of Staley v. I. C. R. R. Co., 268 Ill. 356, expressly held that our workmen's compensation act has no application to injuries received by railroad employees while both the employee and the railroad company are engaged in interstate commerce, but that the employer's liability in such case is governed exclusively by the Federal Employers' Liability Act, and this, too, regardless of the question of negligence or want of negligence of either party. Under the law, therefore, appellee's rights are governed exclusively by the federal act.

The judgment of the Circuit Court of Cook County is therefore reversed and the cause remanded to that court with directions to set aside the order of the Industrial Board.

REVERSED AND REMANDED WITH DIRECTIONS.

420 - 21407

MABEL HENRICKSON WHITENBACH,
Appellee,

vs.

WHITE CITY CONSTRUCTION COMPANY,
Appellant.

APPEAL FROM

SUPERIOR COURT,

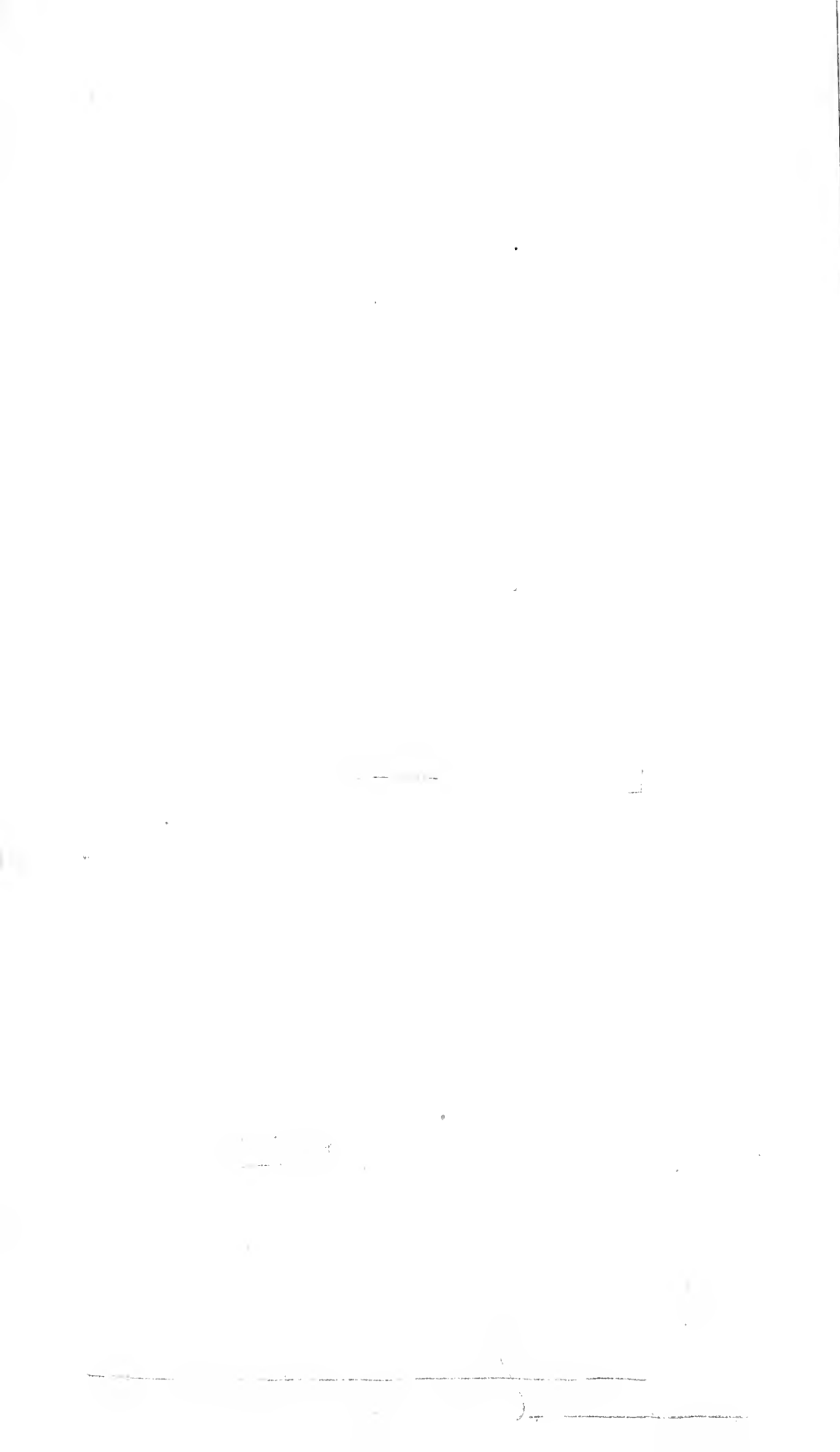
DUCK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Appellee brought suit against appellant to recover for personal injuries, and to reverse a judgment for \$5625 in favor of appellee, this appeal is prosecuted.

[August 24, 1907. ² ~~appellee~~, then a young woman, in company with a young man, visited the "White City", an amusement park located in Chicago, for an evening's entertainment. In the park there was a contrivance known as the "Whizz", which consisted principally of a chute starting from a height of about 25 feet and descending in curves and bumps to the ground, where the patron landed on a hair mattress covered with heavy duck canvass. The mattress was enclosed by frames to which it was securely fastened. A person desiring to slide down the chute was admitted through a gate, upon the payment of a fee. ^{Plaintiff} ~~Appellee~~, after watching for some time several persons coming down the chute and landing on the mattress, paid the admission fee, slid down the chute, and as she landed on the mattress her left ankle was severely sprained.

~~The case was tried on the second and third counts of the declaration.~~ The negligence charged in the second



count was that the covering of the mattress was torn, ripped, loose, unfastened, and dangerous and unsuitable. The third count charged that appellant ordinarily and customarily provided an attendant to assist persons using the "Whizz" and guard them from danger; that the attendant on this occasion failed to perform his duties.

Appellant contends that the verdict is manifestly against the weight of the evidence, in that the evidence established the fact that the covering and mattress were in good condition. The evidence on behalf of appellee tends to show that the covering on the mattress was old, worn and torn; that as appellee landed on it her left foot caught in the torn covering and her ankle was thereby severely sprained. The evidence offered on behalf of the appellant tended to show that the covering was not torn, but in good condition. We have carefully examined all the evidence in the record on this proposition, and cannot say that the verdict of the jury is manifestly against the weight of the evidence.

Appellant next contends that the court erred in refusing to instruct the jury to find it not guilty as to the third count, as there was no evidence to support this count. Counsel in his brief states that at the close of appellee's case he moved the court to instruct the jury, (1) to find the appellant not guilty; (2) to find appellant not guilty as to the second count; and (3) to find it not guilty as to the third count, and offered instructions accordingly; that these motions were denied and the instructions refused; that ^{the} motions were again renewed and instructions offered at the close of all the evidence and again refused. The record discloses that the three motions

were made and instructions offered at the close of appellee's case, but at the close of all the evidence, the only motion made was to instruct the jury to find the appellant not guilty. No motion was made or instruction offered as to the second or third count at this time. The propriety of the court's submitting the case to the jury on the third count is not therefore properly before us. Failure to renew this motion at the close of all the evidence waived the error, if any, in this regard. Lanzan v. Enos Fire Escape Co., 233 Ill. 368. But even if the question had been properly preserved for review in this court, the alleged error would be harmless, as there was proof sufficient to sustain a recovery under the second count. Scott v. Orendorff, 245 Ill. 460; Wing v. Smith, 190 Ill. App. 276; Hunt v. L. Fish Furniture Co. 187 Ill. App. 326.

Appellant further contends that the court committed reversible error in refusing to permit it to prove that appellee made statements after the accident inconsistent with her testimony given on the trial. Appellant produced a witness who had talked with appellee after the accident. This witness was asked to give the conversation that occurred at that time. The court sustained an objection on the ground that it was an impeaching question and that a proper foundation had not been laid. Counsel now contends that the evidence was admissible on the theory that the witness, if permitted, would have testified to statements made by appellee which were admissions against her interest. This theory, however, was not advanced on the trial. If the proffered evidence would tend to show that appellee had made admissions against her interest, it was admissible. Brown v. Calumet River Co., 125 Ill. 600; Math v. Chicago City Ry. Co., 243

Ill. 114; Gorza v. Peoria Ry. Co., 175 Ill. App. 117.

Afterwards, however, the witness without objection was permitted to testify as to what appellee said, and the record fails to show that appellant offered to prove any further or other admissions that were made by appellee. Appellant cannot, therefore, complain. Gorza v. Peoria Ry. Co., supra.

Appellant also contends that the court erred in giving two instructions offered on behalf of the appellee. The first instruction told the jury that the appellee was not bound to prove her case beyond a reasonable doubt, but only by a preponderance of the evidence; that if the evidence bearing upon the case preponderated in her favor, although but slightly, it would be sufficient for the jury to find the issues in her favor. The objection is that appellee's case is not defined, and the jury are left to determine what evidence bears upon it; that it leaves out altogether the appellant's case. The objection is without merit. Instruction No. 2 told the jury that if they believed from the evidence that appellee had proven the allegations of the second and third counts of the declaration by a preponderance of the evidence, and that she had suffered and sustained injuries in the manner charged in said counts, and that she was in the exercise of ordinary care and free from negligence, then they should find the defendant guilty. The objection is that the jury were left to determine what the allegations of the second and third counts were. This objection has been held untenable in a number of cases. Krieger v. A. E. & C. R. R. Co., 242 Ill. 544. A further objection to this instruction is that it was error to refer the jury to the allegations of the second



and third counts of the declaration, as such allegations did not negative the defense of assumed risk. The case of Terra Cotta Lumber Co. v. Hanley, 214 Ill. 246, is cited. It is a sufficient answer to say that the doctrine of assumed risk rests upon and grows out of the contractual relation which exists between master and servant, and as no such relation existed in this case, the question of assumed risk is not involved. Sheninger Co. v. Mann, 219 Ill. 242; C. & E. I. R. R. Co. v. Randolph, 199 Ill. 126; Conrad v. Springfield Ry. Co., 240 Ill. 12.

Appellant further contends that the judgment is grossly excessive, and in support of this contention an affidavit was introduced tending to show that the jurors when deliberating in the jury room, had included in their verdict items for doctors' bills, attorneys' fees, etc. Affidavits of this nature cannot be received to impeach the verdict of a jury. Kelly v. C. & E. I. & P. Ry. Co., 175 Ill. App. 198. Appellant further argues that appellee at the time of the injury was earning about \$6 per week; that she was unable to walk after the injury for about four months; that she was then able to walk with the aid of crutches; that nine months or a year after the injury she returned to her work; that shortly thereafter she was married and has two children, and that there is no evidence tending to show that the injuries she suffered are permanent. These statements are substantially true, except that there is evidence that would tend to prove that the injury was permanent. Appellee testified that at the time of the trial, which was about seven years after the accident, she still suffered pain on account of the injured ankle, and that the ankle was weak, etc. There is also evidence tending to show that her

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left ankle was larger than the right at the time of the trial. There is no contention that the accident affected the general health of appellee in any manner. After a careful consideration of all the facts in the case, we are of the opinion that the judgment is excessive, and that justice would have been done if a remittitur for the amount in excess of \$3000 had been required. If appellee will, within ten days, remit on the judgment of the Superior Court, the sum of \$2625, the judgment will be affirmed, otherwise, it will be reversed and remanded.

APPROVED BY THE COURT.

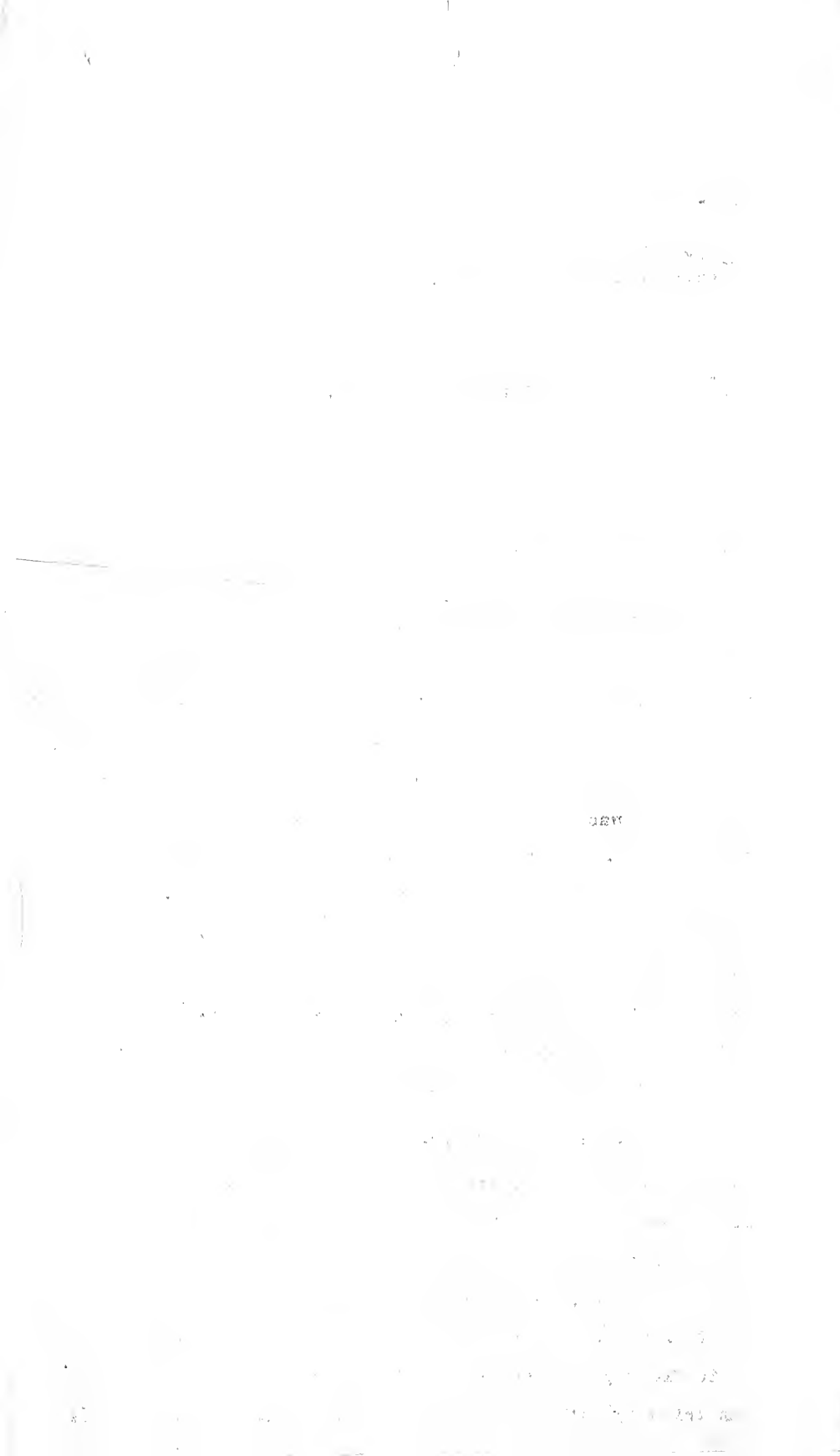
232 - 22278

PEOPLE OF THE STATE OF ILLINOIS
ex. rel. ANNIE MICKARCZYK,
Defendant in error.) ERROR TO
vs.) MUNICIPAL COURT
LOUIS WENGLARZ,) OF CHICAGO.
Plaintiff in error.)

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

This proceeding instituted in the municipal court of Chicago, upon the complaint of the relatrix filed August 20, 1915. It was charged in the complaint that the relatrix was an unmarried woman; that she was pregnant with child, which by law would be deemed a bastard, and that the plaintiff in error (defendant below) was the father of said child. On the trial of the cause, the defendant waived a trial by jury, and the case was submitted to the court without a jury. The court found the defendant to be the father of the child, and a judgment was entered requiring him to pay to the clerk of the court \$550, for its support, maintenance and education. To reverse the judgment the defendant prosecutes this writ of error.

The defendant first contends that no showing was made that the relatrix was an unmarried woman; that it is not sufficient that relatrix swore in her complaint she was unmarried, but that this fact must be established by the evidence, which must be positive and not inferential. Relatrix swore in her complaint that she was unmarried, and it is clearly apparent from the entire record that the case was tried by both sides on this assumption. Evidence was



introduced by the defendant tending to show that she contemplated marriage with another man. Witnesses testified on behalf of the defendant who had known the relatrix all her life, and it is clear from their testimony as a whole that she was unmarried. There is a total absence of testimony or circumstances tending to prove in the slightest degree that the relatrix was married, nor was there any contention or even a suggestion on the trial that the evidence did not establish the fact that she was unmarried. Under these circumstances, we are of the opinion that the evidence was sufficient to justify the court in finding that she was unmarried. People v. Durham, 49 Ill. 233; Cook v. People, 51 Ill. 143; Terry v. People, 31 Ill. App. 37; Alminowicz v. People, 117 Ill. App. 415; Le Plant v. People, 60 Ill. App. 340.

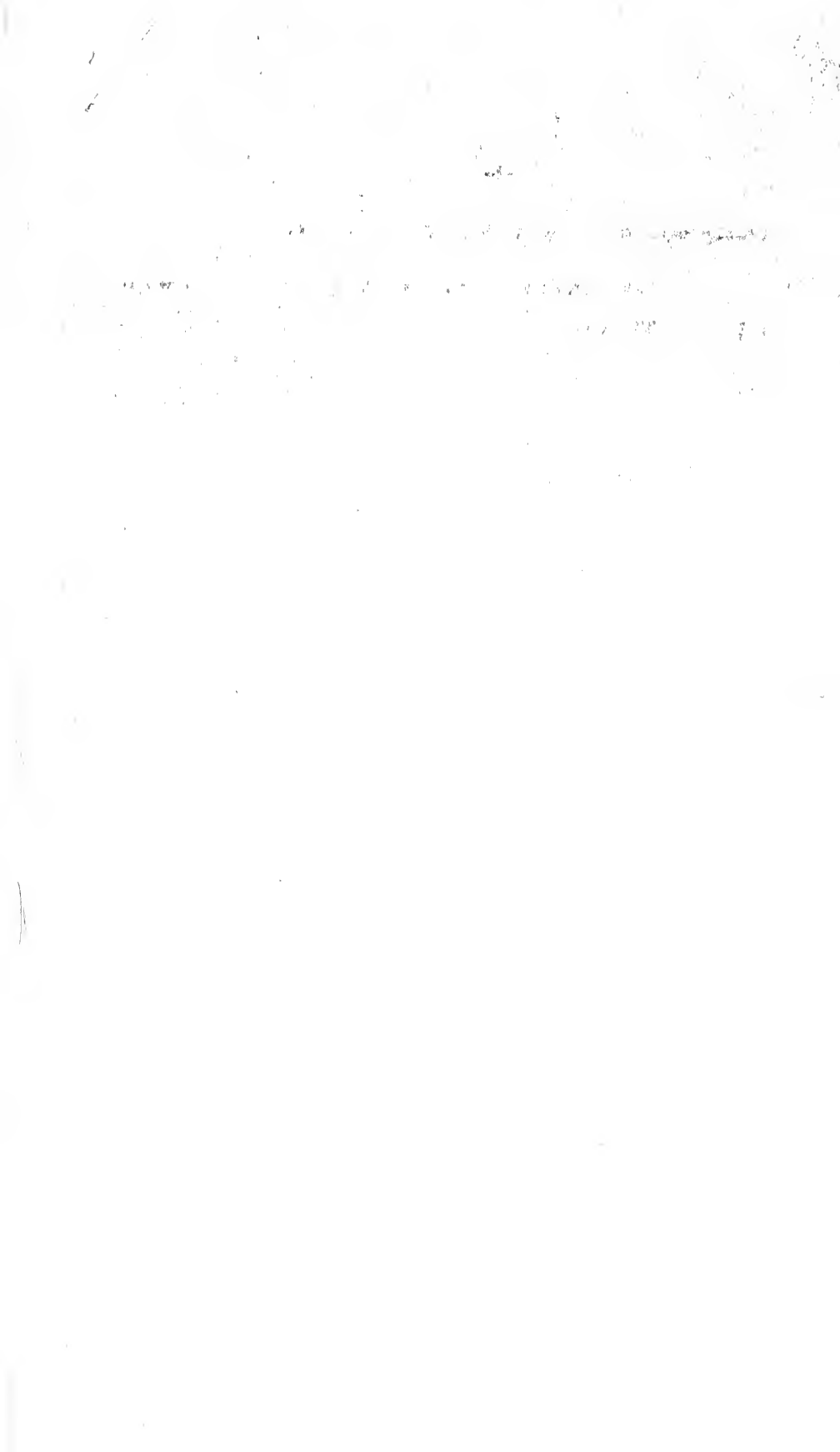
Defendant next contends that the finding of the court that he is the father of relatrix's child is not supported by the evidence, since it rests entirely upon the uncorroborated testimony of the relatrix, who was contradicted by a number of witnesses of unimpeached credibility. This contention is without merit. The only testimony offered by defendant tended to show that other men had sexual intercourse with the relatrix about the time of conception which she denied. The testimony of the relatrix, however, as to her relations with the defendant is undisputed. The defendant, the only one who could have disputed relatrix's testimony as to her relations with him, sat silent and did not testify, and his silence was a circumstance to be considered against him. Ross v. People, 34 Ill. App. 21. The court, who saw and heard the witnesses, found against the defendant, and we are unable to say, after a careful examination of the record, that his finding in this regard is clearly and mani-

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festly against the weight of the evidence.

The judgment of the Municipal Court of Chicago
will be affirmed.

AFFIRMED.



VICTOR YOUNG,

Plaintiff in Error.

vs.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

COUNTY OF COOK and CIVIL
SERVICE COMMISSION OF COOK
COUNTY, ILLINOIS,

Defendants in Error.

MR. JUSTICE GOLDWIN delivered the opinion of
the court.

[This writ of error is sued out to reverse the
action of the trial court in discharging a rule on defen-
dants in error to show cause why they should not be pun-
ished for contempt for failure to comply with a writ of
mandamus addressed to the County of Cook, State of Illinois,
which directed and commanded it "to forthwith place the name
of Victor Young upon the roster of the assistant county agents
in the said County and upon the payroll of said County to the
end that the said Victor Young may at once enter upon the
performance of his duties as assistant county agent with the
same right to continue in the performance thereof and receive
salary therefor as he had to continue in the performance
thereof and receive salary therefor prior to his unlawful re-
moval on June 30, 1911, subject to the laws and rules per-
taining to assistant county agents of Cook County, Illinois."
The judgment under which this writ of error issued was entered
January 31, 1913. It appears that immediately thereafter de-
fendant was restored to the roster of assistant county agents,
and entered upon the performance of his duties as an assistant

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county agent, and received therefor the compensation provided by law. A year and a half afterwards, on July 20, 1914, the writ was issued and served. The plaintiff in error claimed that he was entitled not to the place to which he had been assigned, which was that of one of the second assistant county agents, but to the position of first assistant county agent. The petition for a rule upon the defendants in error to show cause sets up that he had been appointed in 1906 as the only county agent, at a salary of \$166.66 per month; that he took a civil service examination and was certified to that position and continued to hold it until June 30, 1911, when he was unlawfully discharged. He further alleges that the duties which he performed were at all times those duties now performed by the first assistant county agent. This statement is apparently not denied by defendants in error. They rely upon their allegation that there were nine assistant county agents appropriated for during the year 1911-12, and that while one of them was assigned to the general supervision in the office of the county agents, and ^{the} others assigned to sub-stations, it was within the power of the county to transfer some other assistant county agent to the county agent's office, and assign plaintiff in error to other duties. It cannot successfully be contended that the County was without power to add as many assistant county agents as might be needed, and to assign them to such duties as might be thought proper. It appears further by the affidavit offered on behalf of the County, that the examination which plaintiff in error took was an examination for the performance of the duties of a superintendent of sub-stations, and was not an examination for a general supervisory position. It also appears that

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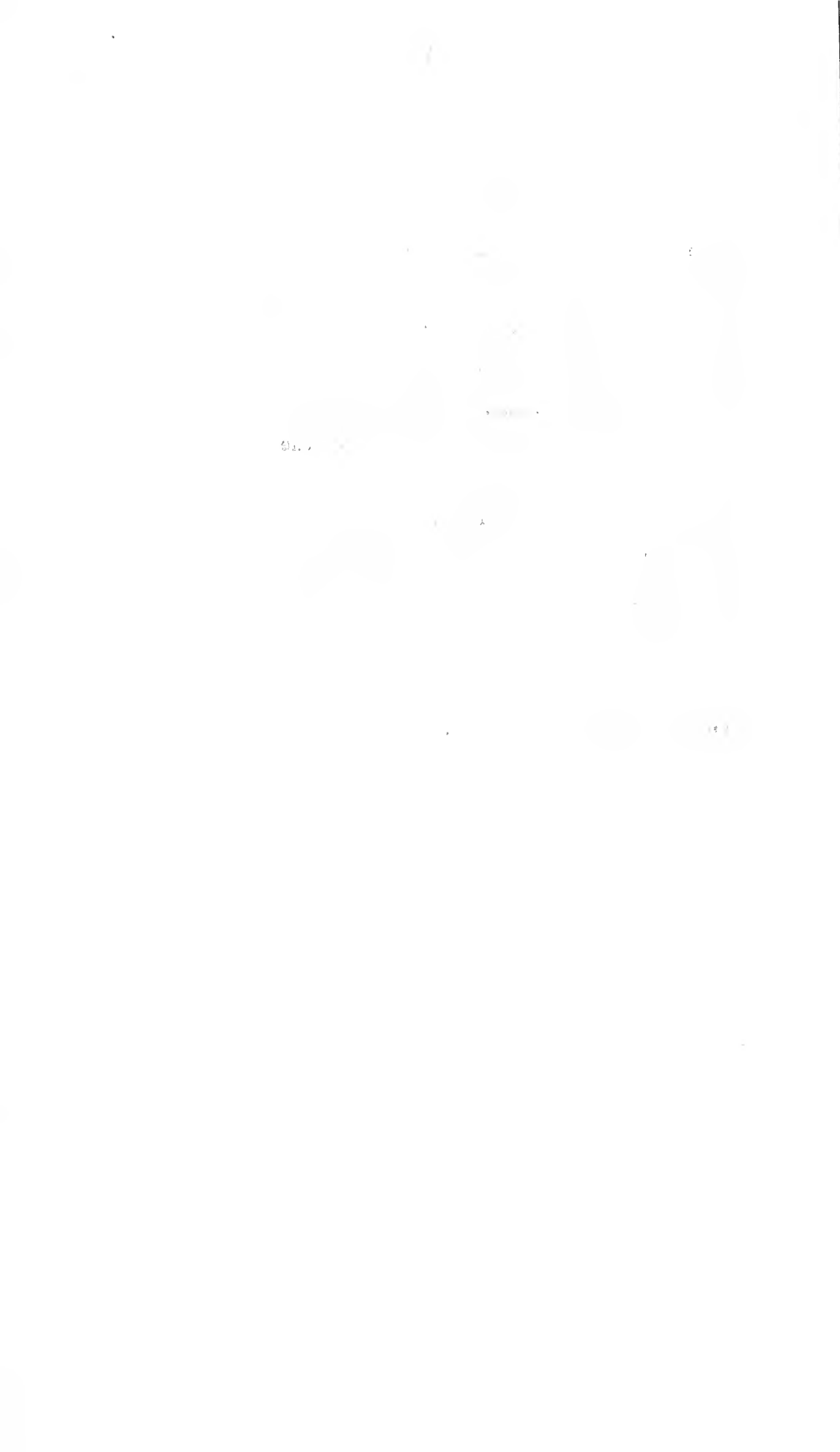
after the discharge of plaintiff in error, the civil service commissioners, apparently in good faith and for proper reasons, in reclassifying the positions in the county agent's office, provided for a first assistant county agent and for second assistants. Thereafter, it held a promotional examination for the position of first assistant, to which plaintiff in error was eligible. This examination was not held until July 25, 1913, five months after the reinstatement of plaintiff in error as assistant county agent. He failed to take this examination, and as no one passed with a sufficiently high mark, another examination, not promotional, was held August 29, 1913, and the highest man on that list was certified to the position.

The only thing that was adjudicated by the judgment in the mandamus suit was the right of plaintiff in error to have his name placed "upon the roster of assistant county agents", with the same rights that he had had prior to his discharge; it did not attempt to adjudicate what those rights were. From the facts disclosed by the petition of plaintiff in error for a rule to show cause and the answer and affidavits of the defendants in error in response thereto, it seems clear that plaintiff in error was not, by virtue of the examination that he had taken or the position that he had held, entitled to be assigned to any particular set of duties as assistant county agent, and that it was clearly within the power of the civil service commission to reclassify and regrade the positions of assistant county agents to provide for the position of first assistant county agent, and to hold an examination to fill that position. There is nothing in the record from which it can be inferred that it was not within the power of the county, at any time prior to petitioner's discharge, to

to direct him to assist the county agent in any way which they might deem desirable, and particularly to assist him by performing the duties covered by the examination which he had originally taken. The case is in no way analogous to that of City of Chicago v. Luthardt, 191 Ill. 516, where an attempt was made to deprive the plaintiff of his office by appropriating for the position of "secretary of the chief of detectives, rank of lieutenant," instead of "chief clerk of the detective bureau of the department of police," without in any way changing the duties of the officer's position.

For the reasons stated, the judgment of the Circuit Court is affirmed.

AFFIRMED.



188 - 21165

MORRIS & COMPANY,
A corporation,

Defendant in Error.

vs.

HEITMAN LITHOGRAPH COMPANY,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

This writ of error is sued out to reverse a judgment against plaintiff in error, hereinafter referred to as defendant, for \$257.56. Plaintiff's statement of claim was for damages sustained on account of defendant's refusal to furnish plaintiff certain advertising hangers in accordance with an agreement which it was alleged to have made. Defendant's affidavit set out, in substance, that it never entered into any contract with defendant to furnish the hangers for any definite amount, but only for whatever the same should be reasonably worth, and that plaintiff abrogated the contract. Plaintiff's affidavit of merits to said set off stated that the price was definitely agreed upon, and that the contract was confirmed by plaintiff in a letter dated September 30, 1913, which was set out in full. The court found the issues in favor of plaintiff, and assessed its damages at the sum mentioned.

The evidence disclosed that in a letter dated September 16, 1913, plaintiff asked defendant to submit a bid on 25,000 hangers; September 22, defendant replied, quoting a price of \$565 for the hangers to be lithographed

in four colors; September 26, defense at trial, asking plaintiff to call, and the representative did call on defendant September 27. Plaintiff's purchasing agent testified that he told defendant's representative that he had talked with a number of representatives of lithographing companies; that some of them said that the hangers could be reproduced in four colors, others that it would take six, others eight, and one, not less than ten; that he said further, "Do you think you could reproduce this in four colors," to which defendant's representative said he thought he could, and that the witness then said, "From the amount of doubt that has been raised in my mind whether you can or not do it, if you want to take this job and furnish us with a sketch that will be perfectly satisfactory and then reproduce it at \$565, will forget about the number of colors and printings it takes to reproduce it and if you want to take the job on that basis, I will give it to you. He said he would take it regardless of the number of colors or printings." A letter offered in evidence, dated September 30, 1913, was as follows:

"Gentlemen:-

We wish to confirm order given Mr. Kallner as follows:

25,000 Boiled Ham Hangers trimmed size 12-1/2" by 17-1/2", on six ply cardboard, gray finish, punched and strung, trademark on the reverse side in black.

We to furnish the rough sketch of the subject from which you are to make up a detailed colored sketch which is to be perfectly satisfactory to us and which we are to approve before the work is started. After the colored sketch has been approved you are to reproduce the same perfect and to our entire satisfaction, using as many printings as are necessary to faithfully reproduce the detailed approved colored sketch.

Time is of the essence of this contract and you are to submit the finished sketch as quickly as possible and use all diligence in reproducing the same after its approval.

In consideration of the above promises and agreements we are to pay you \$565.00 delivered

P. O. b. our plant, Chicago, Ill. in full of all amount, less 5% for cash if paid within ten days from date of delivery.

Please apply requisition 12008 and show the same on your invoice."

This letter was received by the defendant, but no reply to it was ever made. Afterwards, after submitting many sketches, one was C. R'd by plaintiff, and the reason defendant wrote as follows:

"Gentlemen:-

We beg to quote you a further revised price on C. R'd sketch of Boiled Ham Hanger in accordance with the following:

2500 Hangers size 12-1/2 x 17-1/2 to be lithographed in six colors on face, and one color on back on stock 36 x 39 - 6 ply coated one side, for the sum of \$660.50. Terms 2 1/2 for cash in ten days, or thirty days net.

Hoping to be favored with your order, which will be executed promptly and in a strictly first class manner, we remain," etc.

Plaintiff replied that their terms of contract were plainly set out in their letter of September 30, 1913, "which you later accepted," and insisted upon their complying with those terms. Other correspondence followed, and when defendant refused to furnish the hangers at the price originally quoted, plaintiff secured them elsewhere and brought this suit for the amount paid in excess of the price originally quoted.

Defendant seeks to reverse the judgment on the ground, among others, that no contract, either oral or written, was ever entered into. As we have already stated, the record discloses that when defendant submitted its revised price for the hangers in question, to be reproduced in six colors instead of four, plaintiff replied that the terms of the contract were plainly set out in a letter of September 30, 1913, "which you later accepted." In other words, plaintiff first attempted to reply upon a supposed written con-

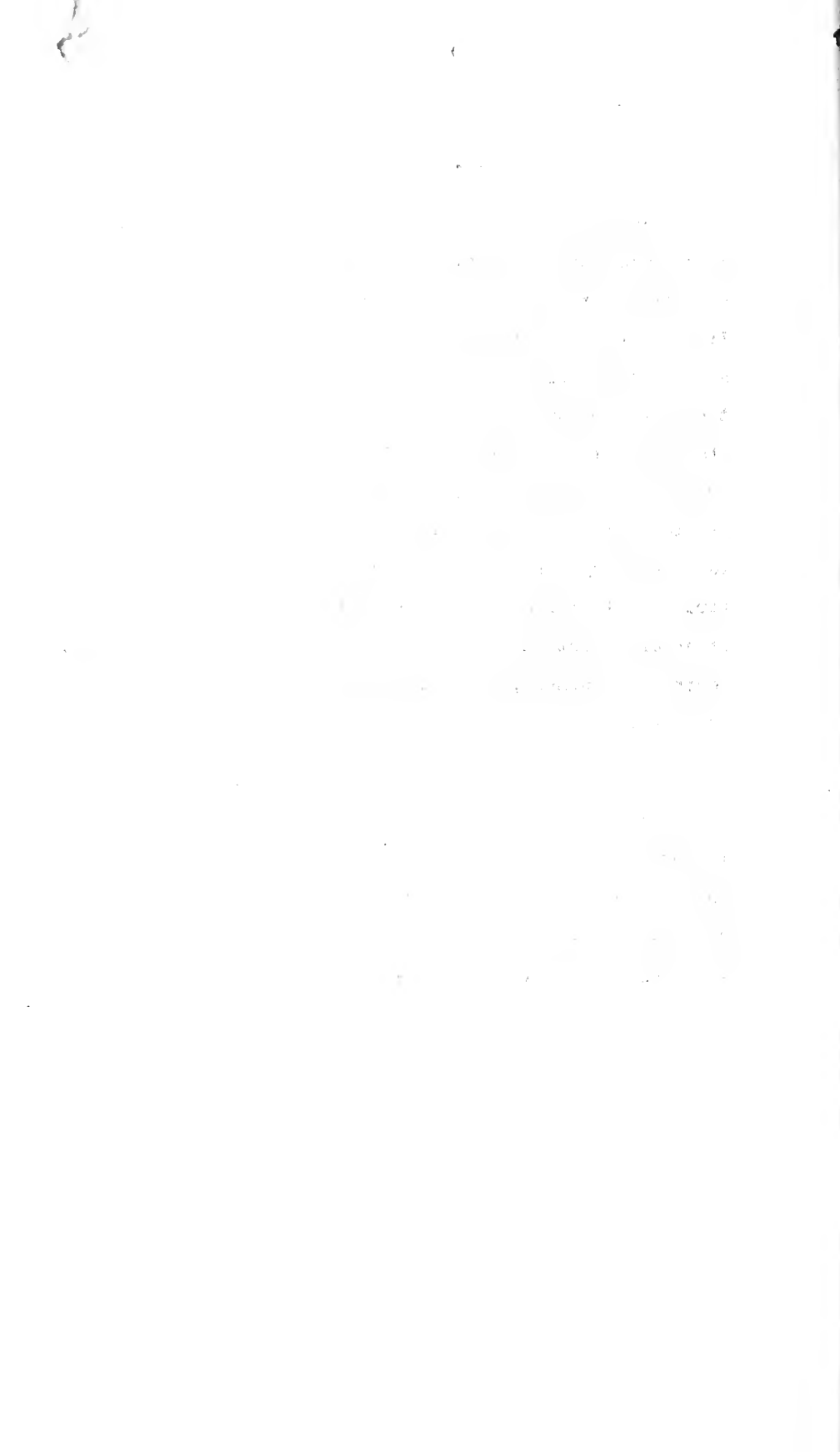


tract, and afterward when it was disclosed that the offer contained in that contract had never been accepted, it fell back upon an alleged oral agreement of which the letter of September 30 was claimed to be a corroboration. If the terms of the supposed oral contract and the letter had been identical, some color would have been given to plaintiff's claim. If we assume the statement of plaintiff's witness to be correct in regard to what was said by him September 27, and compare it with the contents of the letter of September 30, it will be seen that the supposed oral contract contained two stipulations, namely, that the sketch was to be perfectly and entirely satisfactory to the plaintiff, and that it was to be reproduced in as many colors as might be necessary while the letter contained not only these, but the additional stipulation that the reproductions themselves should be "perfect and to our satisfaction," and that "time was of the essence of the contract". Obviously, a lithographing firm might be willing to enter into a contract which left with the other party the right arbitrarily to reject any sketch offered, and not be willing to enter into one which left it the right arbitrarily to reject the finished reproduction, after the work of preparing the necessary plates had been done. Likewise, it might or might not be willing to enter into a contract which recited that time was of the essence. The letter of September 30, 1913, is, therefore, inconsistent with the contention that any binding oral contract existed at the time it was written. We think, moreover, that the statement made by defendant's solicitor is strongly corroborated by the facts and circumstances in evidence. Defendant had submitted and apparently exactly figured out bid of \$565 on a lithographing job based

upon the stipulation that four colors should be used. In response to plaintiff's request defendant then sent a solicitor to see plaintiff relative to its quotation. It is hardly conceivable that a representative shown to be a mere solicitor attempted to enter into a binding contract to reproduce any kind of an advertising hanger that plaintiff might desire, at a fixed price, and without reference to the number of printings it might require, and that he did enter into a bargain which required his principal to make fifty per cent. more printings than it had bargained for. The letter of September 30 is obviously in the nature of an order obtained by a solicitor, which, in the ordinary course of business, does not become a binding contract until accepted.

Upon a full and careful examination of the record we are therefore constrained to say that the evidence is inconsistent with a finding that an agreement had been entered into for the delivery of lithographs for the sum named in the letters of September 16 and September 30. The judgment will, therefore, be reversed.

REVERSED.



245 - 21226

PAGE-DAVIS COMPANY,
A Corporation,

Appellant,

vs.

JOHN P. SHADDOCK,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of
the court.

Appellant, who was plaintiff below, brought suit
against appellee to recover a balance due for tuition which
the latter agreed to pay for a correspondence advertising
course in the Page-Davis school maintained by appellant.
From a judgment in favor of defendant this appeal is taken.

It sufficiently appears from the evidence that a
contract to pay the sum of \$65 for a course in advertis-
ing was signed by defendant, and that a certificate entitl-
ing him to that course was issued by plaintiff. After re-
ceiving about one-fifth of the lessons and paying \$25 tuition,
defendant discontinued the course. The sole question raised
by the record is as to whether the defendant was justified
in repudiating the contract. Anyone agreeing to furnish a
course of instruction, in the absence of a special contract,
binds himself to exercise reasonable skill and judgment and
ordinary care and diligence in furnishing the instruction.
(35 Cyc. 816; Barnes v. Maack, 46 Mo. "pp.407.) Upon
the question of whether the plaintiff had fulfilled this
obligation, there was a decided conflict in the evidence.
On behalf of plaintiff, evidence was offered which tended
to show that the head of the school was an expert in advertis-

ing matters, of large experience, and fully qualified to prepare a course of instruction. No countervailing proof was offered on this point, but evidence was offered by the defendant tending to show that the lessons and criticisms contained palpable errors, as well as mistakes in grammar and spelling, while plaintiff, in rebuttal, offered evidence tending to establish the correctness of the answers given. It was contended by the plaintiff that the course was so constructed that the lessons could be corrected and proper form criticisms made from written instructions furnished by the school to its employes, without the necessity of the exercise of discretion or the possession of a knowledge of advertising on the part of those making the corrections. Evidence was offered on the other side that the corrections were made by girls receiving as low as \$6 a week, who possessed but a superficial, if any, knowledge of the subject, and that they were obliged to exercise some judgment and discretion in preparing the criticism of the answers submitted by the students to the questions which were from time to time sent them. The court labors under the disadvantage of not having the aid of any brief or argument in behalf of appellee's position. Counsel for appellant, on the other hand, have filed an elaborate and voluminous brief and argument in which they say that while the amount involved is small, the question raised is important. It is clear, however, that nothing is involved here but the bare question of whether, in view of the evidence disclosed in this record, the finding of the court in favor of the defendant is so avowedly and clearly contrary to the manifest weight of the evidence as to justify us in setting it aside; after a careful examination of the record we are unable to

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say that it is, and the judgment is, therefore, affirmed.

AFFIRMED.



263 - 21246

MICHAEL DEBDO,

Defendant in Error.

vs.

MICHAEL VOLPE,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of the court.

This writ of error is sued out to reverse a judgment for \$235.25, recovered by the defendant in error, hereinafter referred to as plaintiff, on account of an alleged breach of contract by the plaintiff in error, hereinafter referred to as defendant.

It appears that the defendant was the owner of a one and a half story frame building in the City of Chicago, and entered into a contract with the plaintiff, whereby the latter was to raise the building and put in an additional story and brick basement. After the contract had been signed, plans drawn, and a permit issued, defendant repudiated his contract on the ground, apparently, that it was impossible to carry out the plans without violating the city ordinances. Plaintiff's statement of claim relied upon the contract, and the defendant's affidavit of merits stated that the contract was unlawful, and plaintiff had fraudulently induced him to enter into it. Nowhere in the record, however, is any proof made of any city ordinance. Even had it been shown that there was an ordinance which would prevent the proposed additions to the building without altera-

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11/27

tions being made in the character of the top floor, as defendant's counsel contends, that would not, in itself, show illegality in the contract, unless by its terms it was also shown that it was intended that the work should be done without a compliance with the provisions of the ordinance. No such proof was made in the present case. So far as is shown by this record, the trial court was fully justified in finding against the defendant upon his claim that the contract was illegal, and his contention that he had been induced to make it by fraud. Defendant's contention that the judgment is illegal because it was entered by one not a judge of the Municipal Court of Chicago, cannot be sustained for the reason that the placita shows the presiding judge to have been a "judge of the County Court of Lake County, Illinois, holding a branch of the Municipal Court of Chicago at the request of the judges of the said Municipal Court." The authority of judges of the Municipal Court to request judges of county courts to hold branches of the Municipal Court is expressly given by section 13 of the Municipal Court Act.

Upon a careful examination of the record, we are unable to sustain the further point made, that prejudice or bias was exhibited by the judge presiding at the trial. The judgment of the Municipal Court is, therefore, affirmed.

AFFIRMED.



409 - 21396

TRACY WALTON,
Plaintiff-Appellee.

vs.

HENRY J. DILLNER and
GEORGE REEVE,
Defendants-Appellants.)APPEAL FROM
SUPERIOR COURT,
COCK COUNTY.

MR. JUSTICE GOODWIN delivered the opinion of
the court.

Appellants seek to reverse a judgment against them on the ground that their motion in arrest of judgment should have been sustained. The special counts in the declaration counted on a joint partnership obligation of three persons who were all found as defendants, and the common counts declare against "said defendants." after verdict, the suit was dismissed as to one of the defendants, and counsel for appellants contend that their motion in arrest of judgment should have been sustained for the reason that as the declaration counts on the joint obligation of three living parties, it will not sustain a judgment against two. While it is clear that even after the dismissal of the suit as to the defendant not served, the declaration did, in the special counts, continue to declare upon a joint obligation of the two remaining defendants and the person dismissed out of the suit, yet, in the common counts the obligation declared upon continued to be merely the obligation of said defendants who were, at the time of the judgment, the only persons against whom it ran, and did not declare upon the joint obligation of the three persons named in the special counts. The common counts

are, therefore, sufficient in law to sustain the judgment, and, in the absence of a bill of exceptions preserving the evidence, it is conclusively presumed that the evidence was sufficient to support the cause of action therein declared upon. The fact that the declaration contained other counts which may have been insufficient to sustain the judgment is, of course, immaterial. The judgment is, therefore, affirmed.

AFFIRMED.

308 - 21777.

THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

JULIUS F. TAYLOR,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE GOODWIN delivered the opinion of
the court.

The plaintiff in error was found guilty under
an information charging him with criminal libel, and this
writ of error is sued out to reverse the judgment fining
him \$100.00 for that offense.

Formal proof of the publication by defendant of
the libelous matter charged in the information was duly
made, and the sole ground of defense was the truth of the
libel. By finding the defendant guilty, the trial judge
before whom this cause was tried without a jury, resolved
that issue against the defendant. Counsel for the defendant
have made an exhaustive analysis of the evidence for the pur-
pose of showing that the finding was erroneous. The plea of
justification is, of course, an affirmative plea, and casts
upon the defendant the burden of proof. Upon a careful exam-
ination of all the evidence we are unable to say that the
court erred in finding that the defendant failed to establish
the truth of the libelous matter set out in the information.

The judgment of the Municipal Court will, therefore,
be affirmed.

AFFIRMED.



344 - 21329

F. M. CLARK, Appellee,

vs.

ELIZA J. CONRAD, Appellant.

APPEAL FROM

SUPERIOR COURT,

COCK COUNTY

MR. JUSTICE TAYLOR delivered the opinion of the court.

On August 19, 1903, the appellant obtained a judgment in the Superior Court of Cook County, for \$3,896.86 and costs against the appellee.

On September 20, 1909, the appellant filed in the same court a creditor's bill based on the above mentioned judgment.

On January 20, 1910, an agreement in writing was entered into, which agreement is as follows:

"In consideration of the payments herein provided for and in further consideration of the insolvency of the judgment debtor herein-after named, I hereby agree that I will accept the sum of Three Hundred (300) dollars in full payment and satisfaction of the judgment in my favor in the suit of Eliza J. Conrad vs. Frank M. Clark, No. 211,797, in the Circuit Court of Cook County Illinois, provided said sum is paid as follows: One Hundred (100) dollars on or before May 1, 1910; One Hundred (100) dollars on or before May 1, 1911; and One Hundred (100) dollars on or before May 1, 1912.

"I further agree that in consideration of said payments as above provided, I will take no action on said judgment, except in case of default in said payments, and when said sum of Three Hundred (300) dollars is paid in full, I will take no further steps to collect any portion of said indebtedness; and the satisfaction piece of even date herewith, satisfying said judgment, and the order directing the clerk of the court to dismiss

the first of these is the fact that the
 the second is the fact that the
 the third is the fact that the
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the suit of Eliza J. Conrad vs. Frank H. Clark, et al., No. 293337, in the Circuit Court of Cook County, on the Chancery side thereof, which on the execution hereof, are deposited in escrow with ROGER SHERMAN may be delivered to said debtor, it being understood that no assignment of said judgment has been or will be made.

Witness my hand and seal this 25th day of January, 1910.

ELIZA J. CONRAD. (SEAL)"

The aforesaid written agreement, together with the satisfaction piece, and a stipulation to dismiss the creditor's bill were then placed in an envelope, sealed and deposited in escrow with Roger Sherman.

On the outside of the envelope there was written, by agreement between the appellee and Edward O'Brien, (the latter being the attorney and solicitor for appellant) the following:

"To be delivered to F. H. Clark upon producing receipts from Edward O'Brien for \$300. on O'Brien's order for delivery of the same, or the receipt from Eliza J. Conrad for \$300. or her order for the delivery of the same."

Appellee made payments to Edward O'Brien (and received receipts therefor) as follows; May 14, 1910, \$25., May 31, 1910, \$10., June 4, 1910, \$15., July 5, 1910, \$10., July 7, 1910, \$15., August 1, 1910, \$15., August 3, 1910, \$15.

After these payments were made, appellee, on April 28, 1911, wrote to O'Brien as follows; "Please call and see me as soon as convenient in regard to the Conrad matter". O'Brien wrote in response thereto, on May 17, 1911, from Amarillo, Texas. "I have been laid up away down here for weeks with a fractured ankle. Will return to Chicago in June and will then take up our un-

finished matters." Some time in June, O'Brien called on appellee and said he would call again in a day or two and fix up the unfinished matter, but he never came back.

Appellee about the first of the year, 1912, called on Roger Sherman and told the latter that he wished to pay the balance of the \$300., to which Sherman responded that he did not think he was authorized by the escrow agreement to receive it, and so refused to accept it.

About a week later (according to appellee, but on December 10, 1912, according to Sherman) appellee made a tender of \$200. in currency to Roger Sherman, pursuant to the terms of the escrow agreement, but it was refused. At that interview appellee told Sherman O'Brien was away from Chicago; that he had been trying to locate him, but had been unable to do so.

Appellee, about January 17, 1913, made a tender to one Charles Daniels and to one John W. Mills, both of which were refused.

The original claim against appellee was given to Myer, a clerk in the law office of Charles Daniels, a lawyer of Rockford, Illinois; and Myer and Daniels, with the consent and knowledge of appellant, employed O'Brien of Chicago to take charge of its collection.

On March 4, 1913, the appellant began suit in the Municipal Court of Chicago, basing her claim on the theory that appellee had broken the settlement agreement of January 26, 1910.

On May 23, 1913, the bill of complaint in this case was filed and it prayed, among other things, that the said suit in the Municipal Court be enjoined and that appellant be decreed to abide by the terms of the settlement agreement which latter appellee alleged he had endeavored to carry out.

On June 12, 1913, an injunction order was entered enjoining the prosecution of the suit in the Municipal Court. The cause was heard before the chancellor and a decree entered finding that the equities were with the appellee.

The chief question in this case is whether appellee was so negligent that he forfeited his rights under the escrow agreement.

Taking the settlement agreement into consideration, together with the endorsement on the envelope containing the escrow agreement, we are impelled to the conclusion that the parties thereto did not make time the essence of the contract.

The evidence shows that certain letters, requesting or urging a settlement, were written by Charles Daniels to appellee, and it is claimed that appellee should have made the payments to Daniels or should have looked up appellant and paid her. Appellee, however, cannot be charged with knowledge that Daniels was acting as the authorized agent of appellant. The appellant never, in any way, notified appellee that any one save O'Brien was

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authorized to receive the balance of the money.

In December, 1912, appellee offered to pay the balance due to Roger Sherman, the holder of the escrow, and about the same time made a tender to Daniels, but both were refused. The suit in the Municipal Court was not begun until over a year afterwards, that is, on March 4, 1913.

If appellee had been anxious and endeavored to find out who, in the absence of O'Brien, was authorized to receive the money due, he might have discovered Daniels had authority, or he might have found out definitely the address of the appellant and gone to Rockford and paid her, but lack of such diligence, as that conduct required, cannot be considered now, in equity, as sufficient reason for cancelling the settlement agreement.

It would be superfluous to set forth here an analysis of all the evidence, inasmuch as we are of the opinion that the appellant has failed to prove an inequitable failure on the part of the appellant to carry out the terms of the settlement agreement.

Upon an examination of the record and the decree, we have not found any prejudicial or material error. The decree is, therefore, affirmed.

AFFIRMED.



199 - 22141

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,)

vs.)

ROSIE ELI,
Plaintiff in Error.)

MR. JUSTICE TAYLOR delivered the opinion of
the court.

The plaintiff in error, Rosie Eli, charged
with larceny, was found guilty and sentenced to thirty
days in the House of Correction and to pay a fine of
five (\$5) dollars. By this writ of error she seeks to
have the judgment of the Municipal Court reversed.

On December 1, 1915, A. W. Thompson presented
an information and was granted leave to file it instanter.
It appeared that the plaintiff in error was arrested with-
out warrant or other writ, but being present in court,
jurisdiction of her person was taken and she was taken
into custody to answer the information. Trial by jury
was waived, and the court found the plaintiff in error
guilty and sentenced her as above mentioned.

The information charged that the plaintiff in
error, on November 30, 1915, at Chicago, "did then and
there feloniously steal, take and carry the sum of fourteen
(\$14) dollars lawful money of the United States of the

money of the said M. W. Thompson," contrary to the statute and against the peace and dignity of the People of the State of Illinois. To the information there is attached the affidavit of M. W. Thompson, which affidavit is dated December 1, 1915 and was made before the clerk of the court.

The plaintiff in error has assigned as error, first, that the Municipal Court erred in rendering judgment; second, that the information was fatally defective. As the record does not show that a motion to quash the information was made, and as we now assume no such motion was made, does the law allow the plaintiff in error to claim now that the information was fatally defective?

In The People v. Hunt, 251 Ill. 446, at page 448, the court says:

"A common law indictment for the larceny of money which merely describes the subject of the larceny as a certain number of dollars in lawful money of the government of a stated value, would be too indefinite and uncertain and should, according to the great weight of authority be quashed on motion."

In People of the State of Illinois v. Louis Rosenberg (216 - 22100) Appellate Court, First District, Mr. Justice McGuire said,

"None of these objections go to the substance of the information, and as there was no motion to quash, the motion in arrest of judgment would not reach such defects in an information, for, as it was held in People v. Weber, 152 Ill. App. 102, whatever is included in or is necessarily implied from an express allegation need not be otherwise averred."

In the instant case the plaintiff in error was present in court, waived a trial by jury, submitted to the jurisdiction of the court and yet made no objection to the



form of the description of the offense and made no motion to quash.

We are of the opinion that it is now too late to take advantage of the alleged defect in the information. The judgment is, therefore, affirmed.

AFFIRMED.

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336 - 22291.

SOPHIE HOROWICKI,)	
Defendant in Error,)	
vs.)	Error to
)	Municipal Court
GLOBE MUTUAL LIFE INSURANCE ASSN.,	)	of Chicago.
Plaintiff in Error.)	

MR. PRESIDING JUSTICE MESURELY
DELIVERED THE OPINION OF THE COURT.

This is a suit on an insurance policy issued by the defendant on the life of Sobestyan Horowicki. The policy was issued November 12, 1913, and the insured died November 15, 1915. By the terms of the policy proofs of death were to be furnished to the Association, and the amount payable under the policy became due within sixty days after the acceptance at the office of the defendant company of the proofs of death of the insured, together with the policy and receipts. Plaintiff, the wife of the insured, brought this suit on December 3, 1915, eighteen days from the date of death, and before any proofs of death had been furnished the defendant.

Upon trial the defendant moved for a dismissal of the case on the ground that it was prematurely brought, but this motion was denied by the court. In so ruling the court was in error. Under the provision of the policy any amount payable thereunder was not due until sixty days after proofs of death were furnished, and plaintiff should have complied with this condition before bringing suit. Cases cited where it has been held the proofs of death are waived

because liability is denied are not in point. In the case at bar the defendant does not deny liability for whatever may be found to be due by computation under the terms of the policy.

For the error in denying defendant's motion to dismiss the case the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

JOHN B. SMITH, Administrator
of the Estate of ALFRED SMITH,
deceased,

Appellee,

vs.

THE PETER SCHOENHOFEN BREWING
COMPANY, a corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE MCBURELY
DELIVERED THE OPINION OF THE COURT.

Alfred Smith, a boy fourteen years of age, on July 25, 1911, near the intersection of Union Avenue and 54th street in Chicago, was run over by a motor truck belonging to the defendant and received such injuries as to cause his death. Plaintiff brought suit alleging in five counts negligent management of the truck by the driver, incompetency, failure to warn, and excessive speed.

Three trials have been had. Two juries have disagreed. On the last trial a verdict for \$6,000 was returned upon which judgment was entered. Defendant, appealing to this court, urges that the evidence so clearly shows that defendant was free from negligence that the judgment should be reversed with a finding of fact.

We are of the opinion that this contention must prevail. The testimony of four witnesses who saw the actual occurrence is harmonious and convincing. Under the facts established by this testimony the unfortunate occurrence cannot be charged to any fault on the part of the driver of the motor truck. The story of these disinterested eyewitnesses

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is that ~~the~~ ^{loaded} truck, loaded with barrels of beer, was going south on Union Avenue at ^{moderate} a rate of speed, ~~described as slow~~ or, as some say, from eight to ten miles an hour; that it was making considerable noise; that ^{heard} the boy, Alfred Smith, was walking south on Union Avenue on the west sidewalk between 33rd and 34th streets; that as the truck approached the point where the boy was he ran out in the street in a southeasterly direction, and for about ten feet ran alongside the truck behind the front wheels, then caught hold of it near its center on the right side and hung there a short time, and then, seeming to lose his hold, fell down in front of the rear wheel, which passed over him. ~~There is unanimity~~ in the testimony of these witnesses ^{the witnesses} that the front part of the truck ^{had} ~~passed the boy and was south of him~~ when he left the curb, and that he was at no time in front of the front wheels of the truck after he got out in the street, and that the point where he grabbed hold of the truck was behind the driver's seat. ~~✱~~

The chauffeur, testifying, said that he had had eight years' experience as a chauffeur before the accident; that his truck was a five-ton chain-driven motor truck and was loaded with twenty-five barrels of beer averaging in weight about 400 pounds apiece; that as the truck went south on Union Avenue it made such a noise that it could be heard about a block; that the speed was controlled by a hand throttle on the wheel and that he was driving at a rate between eight and ten miles an hour; that after he crossed 33rd street and as he approached 34th street there were at no time any persons or any vehicles in front of his truck, except an ice cream man; that the first he knew of the accident was a bump on the back wheel on the right hand side of the truck; that he looked around to see what he had hit, and saw the boy lying

the first two terms of the series are equal to zero, and the third term is equal to $\frac{1}{2}$.

It is easy to see that the series converges for all values of x and y .

$$f(x, y) = \frac{1}{2} + \frac{1}{2}xy + \frac{1}{2}x^2y^2 + \dots$$

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on the road; that he thereupon put on the brakes, went back, picked up the boy and carried him to the parkway, and told another witness to call a police officer; that his truck was about eighteen feet long and the driver's seat was right over the front wheels; that as he drove down the street there was nothing to obstruct his view in front of him or at the side of him; that he felt a bump from the impact of his rear right wheel against the object, causing the wheel to go up, and a second bump caused by the drop of the wheel to the pavement; that if the front wheel of the truck had struck the boy he would have felt it in the steering wheel; that he brought his car to a stop within 20 or 25 feet from the time he saw the boy.

On behalf of the plaintiff a boy, Michael Kenny, who was riding on the back of the truck, testified that he felt two bumps, and from this it is argued that the front wheel also must have struck the boy, but we are of the opinion that it was shown that the two bumps were caused as stated by the chauffeur, - by the impact of the wheel as it went up on the body and the jolt as it came down. Kenny's testimony also tends to prove that the boy was not in front of the truck.

Another witness, Lamb, testified for the plaintiff as to the presence in the street next to the west sidewalk of cinders and a barricade on the sidewalk which would make it necessary for anyone going on the west side of the street to walk in the street around this barricade and cinders. The argument of plaintiff is that the boy was struck while he was walking around the barricade and pile of cinders, but this is at best only conjecture, as no witness testified in contradiction to the narrative as given by the eyewitnesses above referred to.

Another witness, Sovetski, manifestly attempting to

assist plaintiff's theory, says that "the truck snatched him down"; but he adds, "I could not tell what part of the truck it was." In many things the testimony of this witness is not convincing, but even in his testimony we do not find anything on the crucial fact as to the occurrence which contradicts the testimony adduced by the defendant.

We have given consideration to the inferences which plaintiff's counsel would have us draw from the testimony and circumstances in the case, but these do not remove the conviction produced by the testimony of those who testified positively as to the facts of the accident. There is no doubt but that the deceased following a boyish impulse to hitch on to the moving truck unfortunately met his death. The driver has been shown to have been entirely free from negligence, and the judgment must be reversed with a finding of fact.

REVERSED.

FINDING OF FACT.

The court finds that the death of plaintiff's intestate was not caused by any negligence of the defendant, and that the defendant was not guilty of any of the acts of negligence charged in the declaration or any count thereof.

359 - 22314

JAMES R. HILLS,

Appellant,

vs.

JOSEPH HOPP,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUDGE HOSUELY
DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks to have reversed a judgment for defendant in a suit brought on an alleged verbal contract whereby defendant agreed to buy back 120 shares of stock of the Standard Theatres Company, which defendant had induced plaintiff to purchase.

Upon trial by the court plaintiff sought to present testimony as to the verbal representations and agreement made by defendant when plaintiff purchased the stock, but the court, being of the opinion that this tended to vary or modify a written instrument, held it to be inadmissible. Plaintiff says that this so-called written instrument is not a contract between the parties but simply a personal memorandum made by defendant and never seen by or delivered to plaintiff; hence the rule as to parol testimony is not applicable. Plaintiff is correct in this contention.

The facts seem to be that originally certificate No. 16 for 120 shares was issued to Joseph Hopp, the defendant, who was president of the Standard Theatres Company; that at the same time he signed the blank form of assignment printed on the back of the certificate; that subsequently, when

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plaintiff bought 120 shares, defendant attached his certificate No. 16 to the corresponding stub in the stock certificate book and marked it canceled; there was also noted on its face a memorandum indicating that certificate No. 17 had been issued to Hills in lieu of No. 16. The printed form of assignment on the back was also filled out reciting an assignment to Hills, but this certificate No. 16 was never delivered to Hills and he never saw it; it remained constantly in the possession of the defendant, Hopp, or of the secretary of the company. Plaintiff received only certificate No. 17, which was duly issued to him directly.

The court was in error in holding that the endorsement on the certificate No. 16 was in any way a contract or writing to which plaintiff was a party. Manifestly memoranda made by officials of a corporation for their own convenience in keeping their records cannot be binding upon a stranger ignorant of their existence.

Points as to the validity of the alleged agreement to repurchase are suggested in the briefs, but these do not appear to have been presented upon the trial of the case. Such points cannot first be made upon appeal. The case must be tried again, and when the plaintiff has been allowed to present his testimony as to the contract upon which he sues, the trial court should determine the facts and the law as to any such agreement; then, if necessary, this court may review such findings.

For the error in ruling upon the admissibility of evidence as above indicated, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

375 - 22330

CHARLES ZENISEK,

Appellee,

vs.

CHICAGO CONSOLIDATED BOTTLING
COMPANY, a corporation,
Appellant.

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

MR. PRESIDING JUDGE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff's automobile came into collision with a motor truck belonging to the defendant. Plaintiff brought suit alleging that the accident was caused by the negligence of defendant's driver. The case was tried by a jury who returned a verdict for plaintiff, assessing his damages at \$425. Defendant appeals to this court but does not discuss the findings of the jury or the question of negligence.

The only thing presented for our consideration is the amount of the verdict, and it is argued that the evidence does not justify this. We have examined the testimony of the witnesses as to the damage done and the cost of making repairs. It is useless to discuss in detail the items, but the jury could properly find that the plaintiff had been damaged to the extent of \$425.

Seeing no reason to reverse the judgment it will be affirmed.

APPROVED.

384 - 22339

MINNIE MANGLER,
Appellant,

vs.

MARYLAND CASUALTY COMPANY,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOS COUNTY.

MR. PRESIDING JUSTICE MCURELY
DELIVERED THE OPINION OF THE COURT.

On March 31, 1913, plaintiff, the widow of William Mangler, brought suit to recover on a policy of accident insurance issued by defendant to her husband. On September 3, 1914, she received \$650 in settlement of this claim (and another claim against another company) and signed a release; a stipulation was also signed by her and the attorneys for the defendant which, after reciting the title of the case, reads as follows:

"It is hereby stipulated by and between the parties hereto that the above entitled cause may be dismissed without cost to either party, all matters in dispute between said parties having been settled and discharged."

Attached is a certificate of a notary public certifying to the execution of the paper by the plaintiff. Mr. Roberts, an attorney at law but not an attorney of record in this suit, was present with her at the time of the meeting for settlement, and the release and stipulation were executed by her under his advice. When apprised of this the attorneys who commenced her suit procured and filed on October 9, 1915, an affidavit from plaintiff repudiating the release and stipulation.

Subsequently, on November 20th, defendant's attorney filed the stipulation, and on his motion plaintiff's

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affidavit was stricken from the files and the cause dismissed in accordance with the stipulation. Upon the hearing of defendant's motion to dismiss the court permitted its attorney to examine the plaintiff as to her affidavit, and also heard other testimony, including that of Mr. Roberts, the attorney present at the time of settlement. The trial court evidently was of the opinion that the facts disclosed did not impeach the integrity of the release or stipulation.

Plaintiff appeals from the order dismissing the suit, urging that the question of fraud in obtaining the release and stipulation was for a jury to pass upon and that it was error for the court to determine the matter. In the cases relied upon to support this contention it appears that upon trial, a release being offered by way of defense, it was held proper for the jury to determine whether the party executing the same knew and understood what he was signing. That is not this case. This was a motion to dismiss on stipulation, and we see no reason why the trial court could not ascertain whether the parties knew what they were signing. In the absence of any authority to the contrary we hold that such a proceeding was not erroneous.

In any event there was no showing that would impair the stipulation. It appears that defendant's attorney denied any liability and claimed that William Mangler did not die from accident. Plaintiff was very anxious to make a settlement which would give her cash, and to this end sought frequently to have an interview with the attorneys for the defendant. She finally sought the assistance of Mr. Roberts, a reputable attorney practicing in this city, who had represented her husband's estate in the Probate Court. At her request he accompanied her to the office of Mr. Cleland, one

of the attorneys for the defendant, and after conference Mr. Cleland offered to pay \$650 in full settlement of this case and also of her claim against another company represented by him. He testified that this offer was made as a matter of economy and to purchase peace. The release and stipulation were submitted to Mr. Roberts and approved by him; he says that plaintiff read them over and that he explained them to her. Mr. Roberts' statement is that he said to Mrs. Mangler: "You have to sign them to get the money"; and after some minutes' hesitation she signed the papers and took the check."

There was manifestly no fraud in the execution of these instruments. The most that can be said for plaintiff's claim of fraud is that she was deceived by fraudulent representations of facts outside of these instruments; but this kind of fraud cannot be inquired into in this action but is cognizable only in a proceeding in chancery.

Fapke v. Hammond Co., 192 Ill. 631.

This was not a settlement of a liquidated claim; there was a vital dispute as to liability. In such a case payment for the withdrawal of a suit does not come under the rule that a settlement for a less sum than a fixed amount due is without consideration and hence void.

The order of dismissal was proper and is affirmed.

AFFIRMED.

MARY GERALDINE NEVILLE,)	
Appellee,)	
vs.	)	ARIZAL FROM SUPERIOR COURT,
CITY OF CHICAGO,	)	COOK COUNTY.
Appellant.)	

MR. PRESIDING JUSTICE ROBERTLY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, suing to recover damages for personal injuries sustained through a defective sidewalk, has had her case tried five times. In the first trial she obtained a judgment for \$9,000, which was reversed and the cause remanded by this court. The second trial resulted in a verdict of not guilty, and the judgment was reversed and the cause remanded by this court. Upon her fifth trial she obtained a verdict of \$15,000, which by remittitur was reduced to \$7,500, and from the judgment for this amount defendant appeals to this court.

In the opinion of this court this litigation should be terminated, and if we were shown to have the power so to do we would not hesitate to enter the necessary order.

The facts in the case are set forth in the opinion rendered upon the first appeal, reported in Volume 154 Illinois Appellate, 557, and again in the opinion upon the second appeal, reported in 191 Illinois Appellate, 372. We think it is unnecessary to narrate these again. That defendant was negligent and liable is conclusively proven by the evidence. The whole controversy concerns the extent of the injuries. That she received some injuries for which she should be compensated is also demonstrated, but the crucial

1. The first part of the report is a summary of the work done during the year. It is divided into two main sections: a general summary and a summary of the work done in each of the four departments.

2. The second part of the report is a detailed account of the work done in each of the four departments. It is divided into four sections: the first section is a summary of the work done in the first department, the second section is a summary of the work done in the second department, the third section is a summary of the work done in the third department, and the fourth section is a summary of the work done in the fourth department.

3. The third part of the report is a summary of the work done in each of the four departments. It is divided into four sections: the first section is a summary of the work done in the first department, the second section is a summary of the work done in the second department, the third section is a summary of the work done in the third department, and the fourth section is a summary of the work done in the fourth department.

4. The fourth part of the report is a summary of the work done in each of the four departments. It is divided into four sections: the first section is a summary of the work done in the first department, the second section is a summary of the work done in the second department, the third section is a summary of the work done in the third department, and the fourth section is a summary of the work done in the fourth department.

question which has occupied the attention of the courts so often has been whether there was any causal connection between the accident and her physical condition many years thereafter.

Plaintiff was injured on June 18, 1896, when she was nine years of age, through a defect in a plank sidewalk. In falling through the walk slivers from a plank partially penetrated her sexual organ. On April 6, 1907, nearly eleven years thereafter, she underwent an operation known as ovariectomy. Upon the first appeal this court found after consideration of the evidence, which in the opinion is discussed extensively, that "there is no causal connection between the injuries suffered and the diseased condition of the ovaries and other organs necessitating operations for their removal." We are of the same opinion on this point upon this appeal. The evidence now before us justifying this conclusion is even stronger than upon the prior appeal. Of great weight in the present record is the positive statement by the late Dr. John B. Murphy negating any causal connection between the accident and the diseased ovaries. The issue on this particular question should be considered as ended.

However, we agree with the statement of this court in its opinion delivered upon the second appeal (191 App. supra), that "it is very clear from the evidence that the plaintiff was entitled to some amount for the immediate results of the accident, whether the alleged remote consequences resulted therefrom, or not." Plaintiff evidently received painful injuries. Her private parts were torn with slivers of wood, which caused considerable bleeding. She received treatment for three or four weeks, and apparently recovered. We are of the opinion that \$1,000 would be ample



compensation for the injuries she received traceable to the accident.

Our conclusion therefore is that if plaintiff will within ten days from the filing of this opinion remit from the judgment the amount of \$6,500, permitting judgment to stand for \$1,000, it will be affirmed; otherwise we shall be compelled to reverse the judgment and remand the cause for another trial.

AFFIRMED UPON REPLETITION; OTHERWISE
REVERSED AND REMANDED.

1. The first part of the paper is devoted to the study of the

properties of the

operator T defined by

$Tf(x) = \int_0^x f(t) dt$ for $f \in L^1(0, \infty)$.

It is well known that T is a bounded linear operator from

$L^1(0, \infty)$ into $L^1(0, \infty)$ with norm 1.

2. In the second part of the paper we study the

operator T^* defined by

$T^*f(x) = \int_x^\infty f(t) dt$ for $f \in L^1(0, \infty)$.

It is well known that T^* is a bounded linear operator from

$L^1(0, \infty)$

404 - 22359

LOUISA WEBER,
Appellee,
vs.
CITY OF CHICAGO,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE McSHEEHY
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to have reversed a judgment for \$2,000 obtained by plaintiff in a suit for damages for injuries she received because of a defective sidewalk.

Defendant says that the proof does not conform to the allegations of the declaration, in this, that the declaration alleges that defendant "permitted said sidewalk at the place aforesaid to be and remain in bad and unsafe condition and repair, and divers boards whereof said sidewalk was constructed to be and remain loose, ^{broken,} disarranged, decayed and otherwise out of repair and safe condition," and the proof shows that the defect was a missing plank; that in Bloomington v. Goodrich, 88 Ill. 558, such a variance was held to be fatal. We do not think this case is applicable. The proof showed that the sidewalk was in a rotten condition; that about five feet of a thirteen foot plank was broken out, leaving the remaining part sticking up; that it was in a shaky condition and many of the planks were loose. As was said in City v. Guindly, 126 Ill. 408 (412):

"The gist of this action was negligence of the city in permitting the sidewalk to be and remain in bad and unsafe repair and condition, and the declaration was, in that respect, sustained by proof that it was in fact in such

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condition, either by reason of a plank being broken, or because the planks were loose and unfastened to the stringers."

We hold that there was no variance, which is supported by the decisions in City of Joliet v. Johnson, 177 Ill. 178; Village of Wilmette v. Grachle, 209 Ill. 621; Town of Cicero v. Bartelma, 212 Ill., 256; Springfield v. Rosenmeyer, 52 Ill. App. 301; City of Chicago v. Wieland, 139 Ill. App. 197.

We are not inclined to find that the amount of damages is excessive. At the time of the accident the plaintiff was a middle aged woman weighing 220 pounds. While walking along after dark she fell into a hole in the sidewalk. She suffered pain in her ankle and it was swollen for nearly a year. She was confined to her house for six months; used crutches for six weeks. At the time of the trial, nearly twelve years after the accident, she still suffered pain caused by swelling. A physician gave his opinion that this injury was of a permanent character. We shall not disturb the amount of the judgment.

Errors are complained of with reference to the conduct of the attorney for the plaintiff while examining the jurors and as to remarks made in argument. We are not inclined to think that these necessitate a reversal.

The judgment is affirmed.

AFFIRMED.

416 - 22371

AUGUSTA LILJEGREN,)
Appellee,)
vs.) APPEAL FROM SUPERIOR COURT,
KROPP FORGE COMPANY,)
Appellant.) CLATSOP COUNTY.

MR. PRESIDING JUSTICE MCGHEE
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to have reversed a judgment of \$3,000 entered against it in a suit brought by plaintiff, widow of Emil Liljegren, to recover compensation for his death, which occurred while he was working for defendant. The suit was brought under the Occupational Diseases Act, Illinois Statutes, Chap. 48, page 1220, Rurd 1916.

Defendant was operating a blacksmith and forge room, and the deceased worked there as a heater on one of the furnaces. He had been employed about four or five days when, on the afternoon of August 21, 1912, he became unconscious and died within half an hour.

We are inclined to agree with plaintiff in the contention that the Workmen's Compensation Act of Illinois, Chap. 48, Rurd, page 1222, does not apply. That act provides, according to the title, "compensation for accidental injuries or death suffered in the course of employment." This death was not caused by an accident, within the meaning of that word as used in the act.

Dr. Stephen Cox and Dr. John Harger, testifying for the plaintiff, were of the opinion that deceased died from "heat exhaustion and insolation"; and Dr. Harger explained that heat exhaustion was "a disturbance of the heat

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regulating center of the body, due to long continued exposure to the heat." It is rather difficult to arrive at an opinion as to whether or not "heat exhaustion" or "insolation", which the doctor defines as "sunstroke", are included in the term "occupational diseases", which the first section of the Occupational Diseases act defines as "any illness or disease peculiar to the work or process carried on * * * illness or disease incident to such work or process, to which employees are not ordinarily exposed in other lines of employment." However, any discussion on this point would be merely academic, as we are of the opinion that it has not been shown that the deceased came to his death through any omission or act of his employer in violation of this act.

Plaintiff argues that the first section of this act is applicable to the facts in this case. This is the general provision that employers of labor in this state engaged in work which may produce disease peculiar to this work shall "adopt and provide reasonable and approved devices, means or methods for the prevention of such industrial or occupational diseases as are incident to such work or process." Manifestly before plaintiff can recover under this act it must be proven that the failure to comply with this provision caused the death of Liljegren. No such causal connection has been shown.

The room in which deceased was working was a large shop 120 feet long by 60 feet wide. In it were five furnaces. Three of them were not fed from the forge room, but the coal was fed from an adjoining room back of the furnaces. Two small coke furnaces were fed from the forge room. There was a brick covering around the furnaces for the purpose of keeping the heat inside. The room was ventilated with windows and doors and an open cupola above. There were about 100 windows in the

room, about 45 by 36 inches; also five doors, two of which were large gates, one of them 10 to 15 feet wide. The skylight or cupola above ran the entire length of the shop. This cupola or skylight contained windows along its entire length on both sides. All of the windows at the time in question, both in the shop and in the cupola, were taken out and the doors were open. There was evidence tending to show that the warm air would ascend from the floor and escape through the openings in the cupola, and fresh air from the outside would enter through the lower windows and doors. Deceased was working at one of the coke furnaces feeding it with coke, also inserting and taking out steel billets. The evidence shows that the temperature of the forge room at that time was 85 to 90 degrees, while the general temperature outside was 77 degrees, diminishing to 75 in the evening. The only evidence as to any device which might reduce the temperature of the room was that of a witness who was engaged in the business of installing ventilating systems, who testified that a system of fans installed in the cupola might affect the temperature of the room, and was of the opinion that if enough fans were placed in the cupola the temperature could be reduced to nearly a normal condition except, as he testified, "in the immediate vicinity of the furnaces." He stated, in substance, that it was impossible with any system of fans to lessen the heat near the furnaces. His statement in this respect was supported by another witness, who testified that fans placed in the cupola would have no effect upon the heat near the furnaces. There was also the testimony of the inspector in charge of the division of ventilation of the Chicago Health Department, who testified positively that fans put up in the room would not lessen the heat. He also gave as his opinion that the ventilation

through the windows and doors, all of them being open, with the number of employees which was usually occupying the room, "would be satisfactory ventilation." From the testimony of these witnesses it is clear that even if it should be conceded that deceased died from "heat exhaustion", the absence ~~existence~~ of fans in the cupola cannot reasonably be said to have had any causal connection with his death.

We think that the greater weight of the evidence proves that Liljegren died of apoplexy. He was a stout man, weighing over 200 pounds, 5 feet 7 inches tall. He had worked here only a few days, and complained in the evenings to his wife of not feeling well. Just before his death a doctor was summoned, who testified that a liquid flow was escaping from his mouth which had an alcoholic odor. This statement of the doctor was corroborated by another witness. His temperature was found to be 97 degrees, which is $1\frac{1}{2}$ degrees below normal. A few minutes after the arrival of the doctor Liljegren died. In deceased's pocket was found a whiskey flask about one-fifth full of whiskey. The doctor testified that it was his opinion that the deceased had been drinking, that he appeared to be a man that indulged in drink. The doctor gave it as his opinion that "the cause of death was apoplexy, which is a hardening of the arteries and the rupture of a blood vessel in the cranium." By the verdict of the coroner's jury it was stated that he died from "organic heart disease combined with insolation." There was abundance of testimony by the physicians, both for plaintiff and for defendant, that a man in normal condition of health would be affected only slightly by a temperature of 85 to 90 degrees, which was the temperature of the forge room. It can hardly be said that such a temperature would cause the death of anyone

in ordinarily good physical condition.

There can be no recovery in this case, and for the reasons above stated the judgment is reversed with a finding of fact.

REVERSED.

416 - 88371

STATEMENT OF FACT.

The court finds that the death of ~~1-1~~ Ljunggren was not caused by any negligence or failure on the part of the defendant, as alleged in plaintiff's declaration and the counts thereof.

419 - 22374

INTERSTATE FINANCE CORPORATION,
a corporation,

Appellee,

vs.

COMMERCIAL JEWELRY COMPANY,
a corporation,

Appellant,

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit on a guaranty of contracts and book accounts sold by defendant to plaintiff, upon trial by jury had a verdict upon which was entered a judgment for \$2,143.82 from which defendant has appealed to this court.

The suit is based on a contract called "General Assignments and Guarantees," which recites that in consideration of a certain sum of money the Commercial Jewelry Company assigned to plaintiff "contracts and book leases" as per schedule, the balance due on the same being guaranteed, with a further provision that "should any disputes or discrepancies arise, thereby decreasing the value of any or all of said contracts and book leases, the undersigned hereby acknowledges financial liability for any shortage that may accrue." By its guaranty attached to this assignment the Commercial Jewelry Company agreed to "guarantee the payment in full of the said balances due on said contracts and book leases as indicated by said schedule, in accordance with the tenor of said contracts and book leases. And whenever any of such book leases or contracts shall be in default for any payment or payments thereon, according to the tenor or condition of such book leases or contracts, we hereby further

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agree, upon demand of the said Interstate Trust Company, its successors and assigns, to repurchase any such book lease or contracts, and to pay for the same the full amount of the balance unpaid thereon."

Complaint is made that on the trial a witness, Tucker, testifying for the plaintiff as to the items making up the amount claimed to be due, testified from memoranda or statements made for use on the trial, and not from original entries. Without detailing the methods of bookkeeping used by plaintiff, it will be sufficient to say that consideration of this witness' testimony shows that the point urged by the defendant is not supported by the facts. The witness testified from vouchers which were the first entries made of the particular transaction. The entries in the books of account which were in evidence were made from these vouchers; hence it was perfectly proper for the witness to testify from these. There were about 600 of such vouchers, and it was perfectly proper for the witness to make a tabulation and computation from these. All the vouchers used by plaintiff in its bookkeeping system referring to these transactions were in evidence, as well as all the schedules containing the accounts bought by it and substitutions received by it. The assignments and guaranties were also all in evidence, and it is merely a matter of computing from the large number of items the amount which plaintiff claims is due.

It is next argued that plaintiff has failed to prove that the defendant, Commercial Jewelry Company, a corporation organized under the laws of Illinois, assumed and became liable for the undertakings of the Commercial Jewelry Company, a copartnership of Philadelphia, Pennsylvania, which was the name of the concern with which plaintiff did business in connection with the earlier contracts and guaranties.

The jury might properly find from the evidence

The first thing I noticed when I stepped out of the car was the cold, crisp air. It was a relief after the warm, humid weather of the city. I walked towards the entrance of the building, my eyes scanning the surroundings. The architecture was a mix of modern and traditional styles, with large windows and ornate details. I felt a sense of anticipation as I approached the door.

The door opened, and I was greeted by a friendly smile. I was led to a small, cozy room where I sat down. A woman in a white lab coat approached me, her hands clasped in front of her. She looked at me with a calm, steady gaze. I felt a sense of ease as I spoke to her. She listened intently, nodding her head as I explained the situation.

She then turned and walked towards a desk, where she picked up a folder. She opened it and looked at some papers. I waited patiently, my heart beating a little faster. She then looked back at me and spoke in a soft, reassuring voice. I felt a wave of relief wash over me.

She then led me to a larger room, where I met with a group of people. They were all looking at me with interest. I felt a bit nervous, but I took a deep breath and spoke. They listened to what I had to say, and then they all nodded in agreement. I felt a sense of accomplishment.

The day ended with a long drive home. I looked out the window at the city lights, feeling a sense of peace. I thought about the day's events, the people I met, and the things I had learned. I felt a sense of gratitude for everything that had happened.

that after the original contract had been entered into between the Commercial Jewelry Company, a copartnership, and plaintiff, that plaintiff furnished the former sums of money and received from it assignments, schedules and guaranties; that afterwards this concern moved to Chicago, where it was organized under the laws of Illinois as a corporation, but continued in the same manner and method to transfer to plaintiff other accounts and give assignments and guaranties, without notifying plaintiff that there had been any change in the concern or in the method and manner of doing business. It signed the same kind of guaranties and assignments and received money from plaintiff in the same way. All the papers in the transactions prior to the formation of the corporation are the same in form as those used thereafter. The negotiations on behalf of the defendant were conducted by a Mr. King, who was the agent for the Jewelry Company while a partnership, and the contract of assignment is signed by him as manager. He also signed contracts of assignment for the corporation. It is undisputed that the corporation, the defendant, took over all the assets of the partnership and continued the business under the same name and manner as it had been theretofore conducted, and that it took over the entire stock of merchandise, office supplies, furniture and fixtures, and all book accounts and bills receivable of the partnership. It was also further shown that the defendant had received large sums of money from plaintiff and accepted the benefits and advantages of the contract and acted thereunder. Under such circumstances defendant cannot repudiate the contract but is bound by its terms. In Herald Dispatch Co. v. Hostetler, 130 Ill. App. 179, it was held that where a corporation carried on its books the liability of another concern with which it had been consolidated, it was estopped to deny that the liability in question was its obligation.

There was no abuse of judicial discretion in allowing the plaintiff to amend its statement of claim. The harm seems to have resulted to the contrary. Holl v. Toluca Coal Co., 272 Ill. 576.

Neither was there any error in overruling the motion for a continuance. The affidavit filed in support thereof does not disclose any facts which could properly induce the court to grant a continuance.

We think the proof as to the uncollectibility of the accounts was sufficient. The witness Tucker testified that from a very large and varied experience in this line of business he knew that the accounts were uncollectible. He was not cross-examined upon this statement. Furthermore, the contracts or assignments in question provided that the defendant should pay the unpaid balance whenever these accounts or contracts "shall be in default," and further that default means such accounts "as shall have become through the bankruptcy of the obligors or through any other cause, uncollectible by suit at law." No evidence to controvert Tucker's statement as to the nature of these accounts was offered.

As to objections to instructions, Rule 5 of the Municipal Court, which is before us in the record, provides that objections to oral instructions must be specific. The record shows that this rule was not observed, the attorney for defendant making only a general objection.

Other points raised as grounds for reversal are not of sufficient weight to cause us to conclude that the verdict should be set aside.

For the reasons above indicated the judgment is affirmed.

AFFIRMED.

ALICE MCGURK,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE RO. JOSELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff was struck by the rear portion or overhang of one of defendant's northbound street cars as it rounded the curve while turning from Jackson Park avenue westward into 56th street in Chicago. To compensate her for the injuries received she brought suit and had judgment for \$2,000.

Many points have been argued by counsel, but in our opinion one consideration is sufficient to defeat plaintiff's claim. The negligence alleged in the declaration as the cause of the accident has not been proven.

Jackson Park avenue runs north and south but does not extend beyond 56th street, which runs east and west. At the junction of these two streets the car tracks turn westward into 56th street, and the regular stopping place of northbound street cars is in 56th street after a car has gone around the curve. Naturally as a large car of the pay-as-you-enter type rounds the curve the rear end will swing out and eastward. There was testimony that the normal overhang of the cars was 2 feet 1 3/4 inches outside the rail, but on the curve at the maximum this would be 3 feet 6 inches more. Plaintiff was standing just south of the cross-walk on the south side of

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of 56th street and 3 or 4 feet from the track. She signaled the motorman to stop and then walked southward, expecting the car to stop before striking the curb, but ~~instead of stopping~~ it continued slowly around to the regular stopping place ~~in both street~~. As the overhang in the rear began to swing out ~~the two children with plaintiff jumped back out of the way,~~ but plaintiff did not avoid it and was struck. In plaintiff's declaration she alleges that she believed the car would stop in Jackson Park avenue; that the motorman could have seen that she was at that place for the purpose of boarding the car, and that if it was not stopped but should continue around the curve while plaintiff was in that position there was danger that she would be struck by the overhang in the rear, and that it was the "duty of said motorman to either stop said car at said place to permit plaintiff to board the same, or to have warned or notified the plaintiff to step back further away from said track * * yet said motorman wrongfully and negligently failed and neglected to either so stop said car at said place ~~or to so notify or warn the plaintiff.~~" A complete ~~answer to this charge is~~ ^{the following} the uncontradicted testimony that ~~the motorman did warn her of the danger. The motorman~~ ^{the motorman} ~~says that when he came near her he called and signaled her to stand back from the car. A passenger on the platform testified in detail as to the motions of the motorman indicating to plaintiff that she should stand away from the car, at the same time telling her to "stand back." This was not contradicted. Plaintiff apparently moved back about two feet, but could not be seen from the front platform after the front end of the car had passed her.~~ ^{Plaintiff testified that she did not notice the warning,} ~~which is probable, but that the warn-~~

ing was given is proved by the decided weight of the evidence. Plaintiff's conduct in moving away after the motorman warned her would reasonably lead him to believe that she would keep away from danger. In any event, he was not required to leave his post at the controller box and watch along the side of the car as it proceeded around the curve to ascertain if plaintiff would heed his warning. Under the circumstances there was no negligence on his part in proceeding to the regular stopping place. Plaintiff, having failed to prove the negligence charged in her declaration, is not entitled to recover.

We should not be understood as holding or implying that there was any duty on the motorman either to stop the car or to warn plaintiff. We are favorably impressed with the statement in Mitchell v. Chicago & G. T. Ry. Co., 51 Mich., 236: "Passengers must take the responsibility of informing themselves concerning the every-day incidents of railway travel, and the company could not do business on any other basis." We merely hold in this case that even upon plaintiff's own theory of the law she has failed to make out a case.

The judgment is reversed with a finding of fact.

REVERSED.



422 - 22377

FINDING OF FACT.

The court finds that the defendant was not guilty of the negligence charged in plaintiff's declaration.

425 - 22380

CHARLES HACK,
Appellee,

vs.

CHICAGO & INTERURBAN TRACTION
COMPANY,
Appellant.

APPEAL FROM THE CITY COURT
OF CHICAGO HEIGHTS.

MR. PRESIDING JUSTICE MCSURELY

DELIVERED THE OPINION OF THE COURT.

Plaintiff, driving his automobile westward on 12th street, as he attempted to cross Halsted street was struck by a northbound car running on Halsted street belonging to defendant. He was injured, brought suit and had judgment for \$2,000. The place of the accident was at the city limits of Chicago Heights, in Cook County, and the case was tried in the City Court of Chicago Heights.

We are of the opinion that plaintiff is not entitled to recover damages from defendant for the reason that he has failed to prove he was in the exercise of ordinary care for his own safety at and just before the accident.

Plaintiff was 57 years of age; a resident of Chicago Heights. He had been accustomed to driving in that neighborhood for four years. He knew there was a car track in Halsted street and that the interurban cars ran frequently in both directions. He says that he knew that a car might be coming along there at any time. He had been driving this same automobile for four years. At the time he was going along 12th street he was moving at a speed of about seven miles an hour; his car was in good condition and equipped with brakes. He says he could have stopped within 14 feet, so that had he seen the northbound car while anywhere east of a point 14 feet east of the track he could have stopped his automobile in time.

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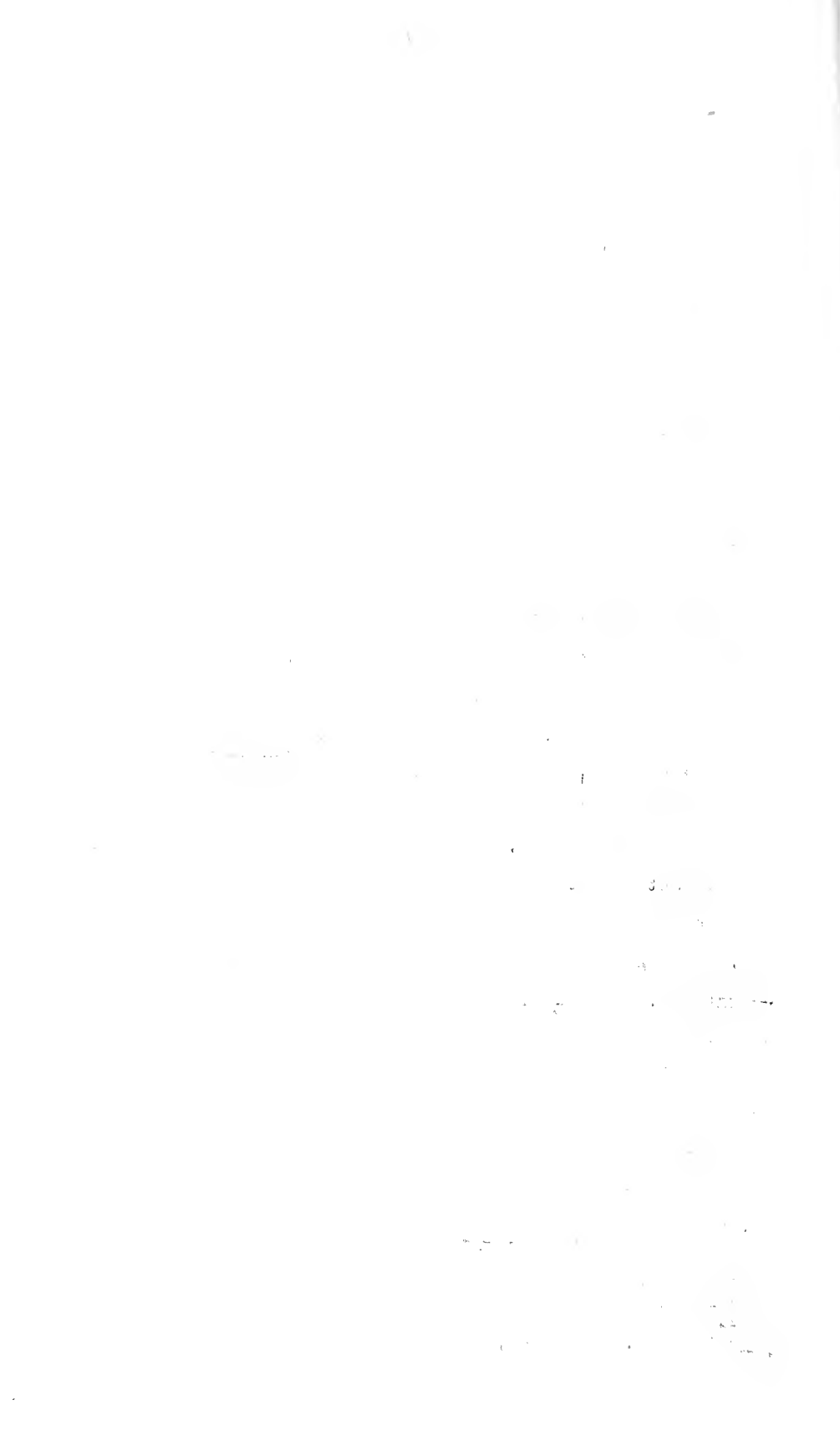
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to have avoided the accident. There was a single track in Halsted street, the east rail of which was about five feet west of the center line of the street. There was a wagon road ^{car} running along the east side of the interurban track. There were no buildings in the block south of 12th street and east of Halsted except at the extreme northeast corner of the block. This accident happened near the northwest corner. Plaintiff claims that a hedge and some trees in the block interfered with his seeing the approaching Halsted street car. There has been considerable testimony and controversy in regard to this shrubbery. In the record are photographs showing the conditions, except that the accident happened at 11 o'clock on the morning of January 18th, while the photographs were taken in June, when there must have been considerably more foliage. Examination of these photographs in connection with the testimony of witnesses ^{showed} demonstrates that from a point on 12th street at least 350 feet east of Halsted there was a clear, practically unobstructed view across the vacant block, and that there was no foliage or tree or obstruction of any kind that would conceal an interurban car, 40 or 50 feet long and 14 to 17 feet high, coming north on Halsted. It is ^{also} established without contradiction that the east rail of the car track was five feet west of the center line of the street and approximately 38 feet from the east line of Halsted street, so that while plaintiff was traveling this 38 feet there was absolutely nothing except the open road between him and the approaching interurban car. If, as he says, he could have stopped his car within 14 feet, he would have had ample space to have stopped it after he had reached the east line of Halsted street and before the point of ^{the} collision. However, Plaintiff himself testified that from the time he was 100 feet from the track he did not look



to see whether a car was coming or not. * He says: "I ran along approaching that track for a distance of 100 feet without looking to the south at all to see whether a car was coming." It is self evident that the driver of an automobile approaching such a crossing as the one in this case should make reasonable use of his senses to guard his own safety, and that the failure to do so is negligence. While we cannot attempt to say at just exactly what distance plaintiff should have looked for an approaching car before attempting the crossing, yet ordinary prudence would deter him from taking a last look at 100 feet from the crossing and then going blindly forward. The law does require that such a look must be taken within such a distance as to enable one to ascertain whether or not there is an approaching car in sight. In Kelly v. Wakefield Street Ry. Co., 175 Mass. 331, it has been held that the fact that a driver looked and failed to discern an approaching car when he was at a considerable distance from the track will not relieve him from a charge of negligence. In Ashland Auto Garage v. Chicago Rys. Co., 183 Ill. App. 207, it has been held that it is contributory negligence in law for a chauffeur not to look for an approaching street car within two minutes before attempting to drive his automobile across a street car track. In Hedmark v. Chicago Rys. Co., 192 Ill. App. 584, the court had for consideration facts very much like those in the instant case, and what was said in that opinion as to the law, with citations of decisions, is applicable to the facts before us. We are in accord with the statement there made that the question of contributory negligence is not to be determined by the probabilities, "but rather by the situation when he was at such a distance before going upon the track that he could control his machine and avoid the danger from the approaching car."

We hold that upon the record it has been shown that plaintiff was guilty of negligence which contributed to the accident, and hence is not entitled to recover. The judgment will therefore be reversed with a finding of fact.

REVERSED.

10. The following table shows the number of people who attended the 2008 Summer Olympics in Beijing, China, and the 2012 Summer Olympics in London, England. The number of people who attended the 2008 Summer Olympics in Beijing, China, was 1.1 million more than the number of people who attended the 2012 Summer Olympics in London, England. How many people attended the 2008 Summer Olympics in Beijing, China?

[illegible]

425 - 22380

FINDING OF FACT.

The court finds that plaintiff was not in the exercise of ordinary care for his own safety just before and at the time of the accident, and that he was guilty of negligence which contributed to the accident.

WILLIAM C. LARSEN,
Appellant,
vs.
JOHN H. W. BARGENT et al.,
Appellees.

SUPERIOR COURT OF COOK COUNTY,
COOK COUNTY.

MR. PRESIDING JUDGE MOURSELY

REMARKS MADE THE MORNING OF THE COURT.

This is an appeal from a decree sustaining a demurrer to a second amended bill of complaint and ordering it dismissed for want of equity. The bill seems to seek damages for the failure of defendants, and especially the defendant Bargent, to convey certain real estate in Cook County, and for failure specifically to perform a contract with relation thereto, and asks that a judgment for such damages be made a lien upon the aforesaid premises - rather an unusual proceeding.

The bill alleges that Bargent owned certain real estate and entered into an agreement with complainant for the sale of said premises, a portion of which agreement was oral and a portion written; that said agreement was executed on November 11, 1912; that Bargent did not carry out his agreement, and that he with other defendants fraudulently conspired to deprive complainant of profits which would accrue from erecting a building on said premises. The bill does not give one a clear idea as to the facts upon which complainant predicates a claim.

A number of points have been made by counsel for appellees in support of the order dismissing this bill, any one of which we think is sufficient. The bill alleges that the contract for the sale of real estate was partly oral and partly written. Appellees pleaded as a special ground of demurrer the statute of frauds. It is well settled that an oral

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26. The twenty-sixth part of the year was spent in the field.

27. The twenty-seventh part of the year was spent in the field.

28. The twenty-eighth part of the year was spent in the field.

29. The twenty-ninth part of the year was spent in the field.

30. The thirtieth part of the year was spent in the field.

agreement for the purchase and sale of any interest in real estate cannot form the basis of any suit, either at law or in equity, when the statute of frauds is pleaded as a defense.

In Cloud v. Greasley, 125 Ill. 313 (319), the court said:

"The entire contract must be in writing, to satisfy the statute. It will not be sufficient that the greater part of the contract is in writing. It must all be in writing."

See also Hartenbower v. Uden, 242 Ill. 434.

Another point decisive against appellant's claim is that the contract is not really an agreement to make a conveyance. The language of the contract is "that you (Sargent) shall use your best endeavors to convey the property herein described, subject to a first mortgage of \$25,000, to the Chicago Title & Trust Company." This is not an agreement to convey the property to appellant, or to any other person for him, and neither appellant nor anyone else would be bound to purchase the property or pay any consideration therefor. Many cases in this state have held that in order to enforce in equity the specific performance of a contract it must be mutual. If for any reason one of the parties cannot compel a specific performance, neither can the other party enforce specific performance. Africani Home, etc., Ass'n v. Carroll, 267 Ill. 380.

Another point of merit adverse to appellant's claim is that he has never offered to pay a consideration for said real estate, or tendered the same, and makes no offer of tender in his bill. It has been held that a purchaser has no right to apply to a court of equity to compel a conveyance unless he has offered himself to perform all the conditions imposed upon him. He must either pay the consideration or tender such payment. Wood v. Sheffer, 248 Ill. 617.

Appellant is barred by gross laches. His written agreement is dated November 11, 1912; his bill of complaint was filed May 27, 1915, 2½ years thereafter. In the meantime

the property had been conveyed to innocent parties, a building constructed thereon, and a loan of \$200,000 secured by trust deed made. Under such circumstances laches would be sufficient to prevent any recovery by appellant.

The decree of the trial court was right and is affirmed.

AFFIRMED.

436 - 22391

R. G. HERNDON et al.,
Complainants,

vs.

THE HERNDON CORPORATION et al.,
Defendants.

On Appeal of GERTRUDE VANDERBILT,
Appellant,

vs.

HANS BARTSCH,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE MCSURELY
DELIVERED THE OPINION OF THE COURT.

A receiver having been appointed of the Herndon Corporation, an order was entered authorizing him to solicit bids for the sale of certain property thought to be assets of the company. Subsequently the court being of a different opinion held that this property was not an asset of the corporation subject to sale by the receiver, and ordered that the prior order authorizing the receiver to solicit bids for sale be vacated and set aside. From that order Gertrude Vanderbilt has appealed to this court. She is not a party to the proceedings but has filed a claim with the receiver alleging that she is a creditor of the corporation.

A motion has been filed in this court to dismiss the appeal. Among other reasons presented it is claimed that Gertrude Vanderbilt was not a party to the proceedings that resulted in the order appealed from, that it does not appear from the record that her claim has ever been allowed, and that

U.S. DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20535

MEMO

TO : THE ATTORNEY GENERAL
FROM : THE DEPARTMENT OF JUSTICE

SUBJECT: [REDACTED]

RE:

DATE: [REDACTED]

BY: [REDACTED]

1. [REDACTED]

A [REDACTED] [REDACTED]

Corporation, [REDACTED] [REDACTED]

side for the [REDACTED] [REDACTED]

the company. [REDACTED] [REDACTED]

opinion [REDACTED] [REDACTED]

corporation [REDACTED] [REDACTED]

the [REDACTED] [REDACTED]

also [REDACTED] [REDACTED]

handwritten [REDACTED] [REDACTED]

the [REDACTED] [REDACTED]

alleging [REDACTED] [REDACTED]

A [REDACTED] [REDACTED]

the [REDACTED] [REDACTED]

Gertrude [REDACTED] [REDACTED]

resulted [REDACTED] [REDACTED]

from [REDACTED] [REDACTED]

her right to appeal or her interest in the cause is not disclosed by her assignment of errors made in this court.

We are of the opinion that what is said by the Supreme Court in Scott v. Great Western Coal Co., 223 Ill. 271, is conclusive upon this motion. The court was considering a motion to dismiss a writ of error, while the instant case is an appeal; otherwise the proceedings are essentially the same. We quote at some length from the opinion:

"The plaintiffs in error, claiming to be creditors of the defendant corporation, presented their claims to the receiver. No action was taken by the court allowing or disallowing said claims, nor was leave asked or granted to permit them to file intervening petitions, or to present cross-bills, by which their claims might have been adjudicated. The mere filing of a claim with the receiver is not sufficient to make the claimant a party to the proceedings. Even the filing of a petition for leave to intervene, in the absence of an order granting such petition, does not make the petitioner a party to a suit. * * * In order to call in question a judgment or decree before an appellate tribunal by a writ of error the plaintiff in error must be either a party to the record or sustain some mutual or successive relationship to the subject matter of the litigation or the parties, out of which arises the right, duty or privilege to have the judgment reviewed or he must have some direct or collateral interest injuriously affected by the judgment upon which he can rest a right to a review. (Derrick v. Lamar Ins. Co., 74 Ill. 404; Burnham v. Lamar Ins. Co., 79 id. 180; Louisville, Evansville and St. Louis Consolidated Railroad Co. v. Surwald, 150 id. 394.) Where the writ is sued out by a party to the record his right appears from the face of the proceedings, and it will be inferred that such right continues to the hearing unless challenged by plea in abatement; but where the writ is sued out by one not a party to the record, his right thereto must affirmatively appear from his assignment of errors. (Winne v. People, 177 Ill. 268.) At common law writs of error are governed by rules of pleading similar to and as well defined as the rules of pleading in original actions. The assignment of errors in a strict common law sense is, in effect, the complaint or declaration of the plaintiff in error, and resembles in every material respect the initial pleading in a court of original jurisdiction. (2 Ency. of Pl. & Pr. 921.) One of the foundation principles of common law pleading requires that the plaintiff must specifically aver his title or interest in the subject matter of the suit."

We find three assignments of error on this record, and in not a line of them is there any reference to or statement of appellant's interest in the matter. Under the decision above cited her appeal must be dismissed.

R. G. HERNDON et al.,
Complainants,

vs.

THE HERNDON CORPORATION
et al.,
Defendants.

On Appeal of GERTRUDE VENDERBILT,
Appellant,

vs.

HANS BARTSCH,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

SUPPLEMENTAL OPINION

BY MR. PRESIDING JUSTICE MASURELY.

Since filing the opinion on October 30th last, giving reasons for dismissing the appeal in this case, there has been brought to our attention by a supplemental record that appellant, Gertrude Vanderbilt, and others, by order of court were given leave to file an intervening petition, and that such a petition was filed, and also that certain defendants filed a cross-bill making her a party defendant. Under such circumstances appellant is entitled to appeal from any appealable order. See our opinion in Evans v. Illinois Surety Co., No. 22559; English v. People, 90 Ill. App. 54; Richey v. Guild, 99 Ill. App. 451.

We might add that neither by the suggestions filed in support of the motion to dismiss nor by the counter suggestions was the true state of the record disclosed to the court.

However, we are of the opinion that the order of dismissal must stand, for the reason that the order appealed

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3. The second part of the paper is devoted to a detailed analysis of the results.

4. The third part of the paper is devoted to a discussion of the conclusions.

5. The fourth part of the paper is devoted to a discussion of the future work.

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11. The first part of the paper is devoted to a general discussion of the problem.

12. The second part of the paper is devoted to a detailed analysis of the results.

13. The third part of the paper is devoted to a discussion of the conclusions.

14. The fourth part of the paper is devoted to a discussion of the future work.

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from is not a final order. The property referred to in the prior opinion is the right to produce the operetta "The Lady in Red." Hans Bartsch, its owner, filed an intervening petition setting out the contract under which it was produced by the Herndon Corporation, and claimed that under the contract such rights had terminated, and petitioned the court for an order canceling and terminating the same, and that all manuscripts, music, scores, etc., be returned to him. Upon this petition the court entered the order appealed from, wherein the court finds that under the contract the rights to produce the operetta cannot be sold or assigned without the consent of Bartsch and that he has not given such consent, and therefore "the said agreement is not an asset of said corporation in the hands of the receiver herein which is subject to sale by said receiver." It was further provided by the order that "the determination of the question as to the termination of said agreement, and of the right of said intervening petitioner to have possession of the manuscripts of said operetta, together with the other property, as prayed for in said intervening petition, be and the same is hereby continued for further hearing by this court."

It is manifest that the right of the receiver to sell this property may depend upon the determination of the question which the trial court reserved for further hearing. If the chancellor should conclude that the rights of the corporation in the property had terminated it would follow as a matter of course that the receiver could make no sale of it. Confusion would result if we should be of the opinion that the receiver was entitled to sell, and the trial court should subsequently hold that the property belonged to Bartsch and not to the corporation; and if upon appeal this court should

affirm the latter order we would be in conflict with our prior opinion. This illustrates the impropriety of passing upon this question piecemeal. When the trial court determines the respective claims of Bartsch and of the receiver in the property we may properly review such an order, and at the same time determine the right of the receiver to sell or transfer it.

The particular order appealed from is one vacating a prior order instructing the receiver to offer the property for sale. This is not a final order, and hence the order of dismissal heretofore entered in this court will stand.

H. H. EVANS et al.

VS.

ILLINOIS SURETY COMPANY,
Appellee.

Interlocutory Appeal

from the Superior Court
of Cook County.

In re appeal of P. J. LUCEY,
Attorney General,
Appellant.

MR. PRESIDING JUSTICE MCSURELY
DELIVERED THE OPINION OF THE COURT.

This is an appeal by Patrick J. Lucey, the Attorney General for the state of Illinois, from an interlocutory order appointing James S. Hopkins receiver of the defendant Illinois Surety Company.

On April 19, 1916, the complainants, representing over 4,000 of the 5,000 shares of the capital stock of the Illinois Surety Company, filed their bill seeking a dissolution of the company, under section 2 of the act providing for the dissolution of insurance companies, chap. 73, par. 12, Hurd's Statutes. The bill averred the insolvency of the company and sought to have it restrained from doing further business, and asked for the appointment of a receiver to take over its property. The defendant company appeared and confessed the averments of the bill and joined in the request for a restraining order and the appointment of a receiver, and thereupon at the request of all parties then in the case James S. Hopkins was appointed. He qualified by giving bond and entered upon the discharge of his duties.

On May 19th following, by order of the court, Patrick J. Lucey, as Attorney General, for and on behalf of the people of the state of Illinois, entered his appearance

and filed an information and petition, in which it is admitted that the allegations of the bill and answer as to the insolvency of the company are true. The petition also averred facts tending to call in question the propriety of the appointment of James S. Hopkins as receiver. Subsequently he filed an answer to the bill, but the necessity for the receivership is nowhere denied.

Having thus come into the case the Attorney General appeals to this court alleging that the chancellor erred in the order of April 19th appointing Hopkins receiver.

Complainants have alleged by cross-errors the impropriety of the order permitting the Attorney General to become a party, and upon this ground argue for the dismissal of the appeal or the affirmance of the order appealed from. After consideration we have concluded that we cannot on this appeal consider the propriety of the order permitting the intervention of the Attorney General. This appeal is strictly statutory. The only interlocutory orders reviewable are those "granting an injunction, or overruling a motion to dissolve the same, or enlarging the scope of an injunction order, or appointing a receiver, or giving other or further powers or property to a receiver already appointed." Sec. 123, chap. 110, Illinois Statutes, Hurd. Orders as to parties to a proceeding, and like orders, are not reviewable by this court except upon final decree. However desirable it may be to review such interlocutory orders, the legislature has not given us the power. We must confine our consideration to the interlocutory order appointing a receiver and treat the appeal

therefrom, when brought by a party of record to the proceeding, as if brought by a party whose interest in the matter was not questioned.

In English v. People, 90 Ill. App. 54, it was sought to dismiss the appeal from an order appointing a receiver on the ground that the appellant had no standing whereby he could question the appointment because it was not disclosed what his rights were, or whether he had any; but the court held that it was not necessary to wait until his interest was determined, saying, "the manifest purpose of the act is to afford a speedy and summary review of the proceeding by a defendant who may deem himself to be injured by the order of the lower court." An analogous situation appears in Richey v. Guild, 99 Ill. App. 451, where it was urged that the appeal should be dismissed because the appellant was not a party defendant when the order appealed from was entered. The court denied this motion because the appellant had filed an answer and had been "recognized by the court below as a party to the suit." Manifestly under the statute no appeal would lie from the order permitting the Attorney General to appear, and as a determination of the propriety of this order is not necessary in our consideration of the propriety of the order appointing the receiver we shall not comment thereon, although it has been argued fully by both counsel, almost to the exclusion of any other points.

The motion to dismiss the appeal for the reason urged by complainants will be denied.

It is urged as ground for reversal that no notice of the application for the appointment of a receiver was given to the Attorney General or to the Insurance Superintendent, or to any public officer of the state empowered to represent the

interests of the people of the state, and that no such officer was made a party defendant. If such officers were not necessary or proper parties it was of course unnecessary that they should have notice. Their right to appear and intervene is at least debatable. The Attorney General, having appeared, had the right to question in the trial court any prior proceedings, or in this court to attack the appointment of a receiver; but if a receiver is necessary, as appears from the facts averred in the bill and admitted by the answer of the defendant, and also by the petition and answer of the intervenor, we see no good reason to reverse the order of appointment solely because the intervenor did not have notice.

Upon consideration of the receivership upon its merits we are of the opinion that the order should stand. As we have above indicated, it is conceded by all parties that the bill and defendant's answer made a proper case for a receiver, under section 5 of the Dissolution of Insurance Companies act, chapter 73, Illinois Statutes, Hurd. The petition and answer of the Attorney General contain nothing in contradiction to the material averments of the bill in this respect. No contention is made by anyone in this court that the situation did not require the appointment of a receiver.

The contest narrows down to the appointment of the particular James S. Hopkins, and the assertion is made that he is objectionable because of his relations to the company and its president and general counsel. The personnel of a receiver is not a proper subject for review within the statute under which we are acting. We adopt as expressing our views what was said in the opinion in International B.L. & I. U. v. McGonigle, 72 Ill. App. 399, which was an appeal

from an interlocutory order appointing a certain person receiver in lieu of certain other receivers theretofore appointed, and the court said:

"It seems that from such an order no appeal will lie. In the absence of legislation the act of the chancellor appointing a temporary receiver is held to be largely a matter of judicial discretion. And in our State, prior to the act of June 14, 1887, appointment of a receiver pendente lite, being an interlocutory order, was held to be not reviewable upon writ of error. Coates v. Cunningham, 80 Ill. 467.

"Looking at the reason of the rule, there is much more ground for holding that in the absence of legislation no appeal could lie from an interlocutory order merely substituting one person for another as receiver. Such order, affecting only the personnel of an officer of the court, is purely a matter of judicial discretion, and, as an interlocutory order, is not reviewable upon appeal under the rule of Coates v. Cunningham, supra."

Objections to an order appointing a receiver, grounded upon objections to the personnel of the appointee, the necessity of a receivership being conceded, is essentially an argument for the removal of the present receiver and the substitution of another. This being purely discretionary with the chancellor is not within our purview.

Motions have been made to strike from the record certain papers; such motions are immaterial and will be stricken from the files.

For the reasons indicated the order appealed from is affirmed.

AFFIRMED.

JOHN H. HOWARD et al.,)	
Appellees,)	
vs.	)	APPEAL FROM CIRCUIT COURT
)	
WILLIAM FOSTER BURNS,	)	OF COOK COUNTY.
Appellant.)	

MR. JUSTICE HOLDON DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of foreclosure. Mary M. Shaw and James LeRoy Shaw are the original debtors and makers of three notes secured by a trust deed conveying certain real estate in Cook County, including the rents, issues and profits thereof, to Simon W. Straus, trustee. The indebtedness aggregates \$30,000 and is evidenced by three notes, one for \$24,000 and two for \$3,000 each, the larger note maturing January 26, 1914, and the others on January 26, 1912 and 1913 respectively. The notes bear interest at $5\frac{1}{2}$ per cent before and 7 per cent after maturity. The notes are payable to the order of the makers and by them endorsed and delivered. Coupon interest notes evidencing the several semi-annual instalments of interest accompanied the originals.

Subsequent to the execution and delivery of the trust deed by the Shaws they conveyed the mortgaged property to Carl O. Youngquist by warranty deed, in and by which he assumed and agreed to pay the \$30,000 indebtedness with interest secured by the trust deed upon the property conveyed. Thereafter Youngquist and his wife conveyed the mortgaged property to Ormand B. Jacobson, the mortgage indebtedness being considered as a part of the purchase price for the property so conveyed. Jacobson and wife conveyed the mortgaged property to Emmett G. Morris, who took the same by warranty deed subject to the mortgage indebtedness. Burns,

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$$2.1.1 \quad \text{If } \mathcal{A} \text{ is a } \mathcal{C}^* \text{-algebra, then } \mathcal{A} \text{ is a } \mathcal{C}^* \text{-algebra.}$$

Figure 1. The effect of the concentration of the *Agaricus bisporus* spores on the growth of *Agaricus bisporus* and *Agaricus bisporus* spores.

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appellant here, obtained a judgment by confession against Morris for \$210.33 and costs. This judgment became a lien upon Morris' interest in the mortgaged premises. Thereafter a levy on the interest of Morris in the mortgaged property under the Burns judgment against him was made by the Sheriff of Cook County, Burns redeeming from a master's sale as a judgment creditor under a junior mortgage. This sale and foreclosure redemption ripened into a sheriff's deed to Burns, under which deed the rights of Burns in the mortgaged premises rest. This is his source of title and claim.

When the first \$3,000 note matured it remained unpaid, together with the interest due on all of the indebtedness at that date. In order to escape threatened foreclosure proceedings, none of the subsequent purchasers of the mortgaged property offering to pay the amount due, James LeRoy Shaw, who was primarily liable as maker of the note, paid the matured indebtedness, aggregating \$3825, to Straus, the trustee. Complainant Howard, at the request of Shaw, assisted Shaw in making such payment by furnishing him with \$1825 upon the agreement and understanding that foreclosure proceedings would be brought in Howard's name and that Howard should either receive back his money with interest or obtain the mortgaged property subject to the balance of the mortgage debt. Howard filed the original bill in his own name, but in fact in behalf of himself and Shaw, to foreclose the Straus trust deed by reason of the non-payment, by the owners of the mortgaged premises or of any one for them, of the interest and principal notes aforesaid.

On August 20, 1912, Shaw paid the interest due July 26, 1912, on the remaining two principal notes, aggregating \$742.50. When Shaw paid the principal and interest



notes it was upon the understanding with Straus, the trustee, that as to Shaw and Howard, Shaw should become subrogated as against the mortgaged property to the rights of the holder of the indebtedness, but subordinate to the lien of the remaining unpaid notes, both of principal and interest.

At the time of the hearing before the master, Carl O. Stonehill was the owner of the remaining notes for \$3,000 and \$24,000 respectively. Burns filed an intervening petition asking to be made a defendant to the Howard bill; this was allowed and he answered. Shaw, Stonehill and Burns subsequently filed cross-bills setting up their several interests and claims; answers were filed and replications thereto joined. Upon the issues made upon the bill and the several cross-bills the cause was referred to a master to take proofs and report his conclusions of fact and law thereon. Objections and exceptions filed to the master's report were overruled and a decree entered in accordance with the master's report. That decree found, inter alia, that appellant Burns was the owner of the mortgaged premises, subject to the amount unpaid upon the \$30,000 indebtedness secured by the trust deed from the Shaws to Straus, trustee, and the costs and expenses of the foreclosure; that Burns obtained title in virtue of the Sheriff's deed above mentioned, through purchase as a judgment creditor of Emmett G. Morris and by the redemption of the premises from a previous master's sale under a junior mortgage; that the cross-complainant, Stonehill, was the owner of the two last named notes, aggregating \$27,000, and that for the amount due on those notes he had a first and valid lien upon the mortgaged premises; that Shaw, for the amount of the payments made by him to the trustee of interest upon the mortgaged indebtedness and

of the first principal note of \$3,000, was subrogated to the rights of the holder of said notes at the time of making such payments; that said payments were made to the trustee without fraud and to protect his liability as a maker of the notes and to preserve his right of subrogation, and that such rights were subordinate only to the right of Stonehill for the amount due and payable on the two notes for \$3,000 and \$24,000 respectively and the costs and expenses of the foreclosure proceeding; that the complainant, Howard, has an interest in the first note for \$3,000 to the amount of \$1825 with interest, and that the rights of Howard are subordinate to those of Stonehill.

Upon the filing of the original bill a receiver of the rents, issues and profits of the mortgaged premises was appointed.

The Court found that appellant Burns' rights and interests were subordinate and subject to the rights of all the parties, as decreed by the court, under the trust deed of the Shaws to Straus as trustee.

There was taxed under the terms of the Straus trust deed \$1100 as solicitors' fees - \$500 to Howard and \$600 to Shaw. The sum of \$2419.40 in the hands of the receiver and the clerk of the court arising from the rents, issues and profits of the mortgaged premises was decreed to be paid to Stonehill and to be credited upon the amount of \$28,922.97 found due him.

The mortgage foreclosure under which Burns redeemed at the time of the execution sale was for \$4,000 and was junior to the Shaw trust deed.

Appellant Burns is the only party challenging the decree, and therefore it will only be necessary in this

opinion to take notice of such matters as affect the rights and dispose of the contentions of Burns.

Burns' main contention is that Howard has no interest in the notes paid by Shaw and that the payment by Shaw of the notes had the effect to extinguish the indebtedness. He likewise contends that part of such indebtedness was repaid to Shaw by order of the court out of moneys in the hands of the receiver, proceeds of rents of the mortgaged premises collected by such receiver, and that no right of subrogation existed in favor of Shaw and that neither Shaw nor Howard was entitled to any relief. Burns also assigns and argues as error an allowance of two separate amounts as solicitors' fees, one to Howard and Shaw and the other to Stonehill. Burns also claims, as owner of the equity of redemption, to be entitled to the rents collected by the receiver.

We are satisfied that the testimony supports the findings of the master and the decree of the chancellor. The trust deed mortgaged the rents, issues and profits as security for the \$30,000 loan, and they thereby became as much a part of the security for the debt as the land and the improvements thereon. On the bill filed to foreclose for non-payment of the indebtedness, it was the duty of the chancellor, upon motion of the complainant, to appoint a receiver to collect the rents, etc., and as the amount collected by the receiver was directed to be paid to Stonehill and to be credited upon the amount due him, and as Burns' rights were subordinate to those of Stonehill and those of the other parties, he is benefited by the payment of these rents to Stonehill, as the amount so paid reduces the amount of Stonehill's claim against the mortgaged premises.

While Burns was the owner of the equity of redemption, such equity must be held to be subject to the Straus trust

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deed and all its provisions, including the conveyance of the rents, issues and profits as security for the debt. The act of appointing a receiver operated to deprive Burns of the possession of the mortgaged premises and the right to collect the income and exercise other acts of ownership, until the mortgage indebtedness was extinguished or the property redeemed from a sale under the decree.

Furthermore, in no event would Burns be entitled to these rents; Howard's and Shaw's lien being subordinate only to that of Stonewall, the rents would be theirs in preference to Burns. While Shaw made the Reardon mortgage, it was junior to that of the Straus trust deed; still when Burns acquired his interest the Reardon mortgage had been foreclosed and he took title with knowledge of these facts, which the record disclosed. He certainly was not misled to his injury, for as between Shaw and subsequent purchasers of the mortgaged premises, the property stood as security for the mortgage debt. The personal liability of Shaw could not be enforced by purchasers subsequent to the mortgage; therefore in this regard Burns has not suffered any infringement of his legal rights.

At the time when Shaw's and Howard's money paid interest and principal of part of the indebtedness secured by the trust deed to Straus, Shaw had conveyed the title to third parties and was no longer interested as owner. While he was primarily liable as the maker of the notes to the holders thereof, yet as between him and subsequent purchasers he was not so liable, and as to them the mortgaged property stood as security for the payment of the indebtedness, such subsequent purchasers being liable to have their title divested under a sale in any foreclosure proceedings which might be instituted to enforce payment of the mortgage debt. In the event of Shaw's payment of the indebtedness or any

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part of it, in virtue of his primary liability to the owners of the three notes as the maker thereof, then as to subsequent purchasers and lien holders he had a right to look to the property for reimbursement for any payments made therein, and would in that event be subrogated to all the rights of the party holding the notes so paid by him.

Howard, at Shaw's request, furnished money to enable Shaw to take up the first maturing note and discharge accrued interest. Under an agreement between them, Howard was to participate in the security and be repaid his advances either from money realized from the sale of the mortgaged premises or by acquiring the property. There was nothing unlawful in this agreement, and it operated to keep the notes alive and maintain their lien under the trust deed, and as the parties thereto are satisfied with that arrangement, and no right of Burns is infringed by its being carried out, we are unable to see that any third party has the right to complain or to attack the transaction.

While the notes, when paid, were not surrendered either to Shaw or Howard, they were by an agreement with Straus, the trustee, retained by him without being marked paid, and were kept alive for their interest, subject only to the rights of the holder of the unmatured notes. We discern no illegality in such an agreement.

Stonehill had a right to demand payment of Shaw, who was personally liable as maker of the notes. As to Stonehill, the notes were to be a lien after the remaining indebtedness was paid, and in all other respects Shaw was to be subrogated to the rights of Stonehill, the legal holder, after the amount due him had been paid.

In Fish v. Clover, 154 Ill. 86, the doctrine of

subrogation invokable in this case is laid down as follows:

"It has been held that where the owner of land sells it subject to a mortgage executed by himself, the land in equity becomes a primary fund for the payment of the debt, and the vendor occupies the position of surety, and upon payment of the mortgage debt is entitled to be subrogated to the rights of the creditor the same as any other surety."

The subsequent conveyance by Shaw of the mortgaged property was subject to the incumbrance created by himself and assumed by the purchaser as a part of the consideration for the conveyance. As between Shaw and subsequent grantees, he had the right to look to the property for reimbursement for payments made by him on the indebtedness secured by the trust deed to Straus, and to that extent was subrogated to the rights of any note holder after the remaining mortgage debt had been discharged. We see no reason to deprive Shaw or Howard of the benefit of this legal doctrine.

As between Burns and Shaw the mortgaged property is primarily liable for the payment of any or the mortgage debt which Shaw may have paid.

As to solicitors' fees taxed and ordered paid from the proceeds of the sale, the terms of the trust deed provided for such solicitors' fees and made them an additional charge upon the mortgaged premises in the event of foreclosure proceedings. The allowance for solicitors' fees is \$1100. The fairness of the amount is not disputed. The only criticism indulged is as to the amount being apportioned - \$500 on the original bill and \$600 on the Stonehill cross-bill. While it may be true this method of dividing an allowance is unusual, still we think it warranted by the conditions found in the record - two separate solicitors representing two different and separate interests. While it was not necessary for Stonehill to file a cross-bill, his right to do so was not disputed before the chancellor and is therefore unavailing here. The

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solicitors' fees are properly costs in the cause, and we know of no reason why costs may not be apportioned, and we think the condition of the record in this case justifies the chancellor's action in apportioning them as he did. Appellant Burns acquired his interest in the mortgaged property with knowledge of all the claims resting upon it. It is not at all inequitable or unconscionable to expect that Burns discharge the liens which the record disclosed at the time he acquired his interest before he shall be permitted to enjoy title to the mortgaged property.

Agreeing as we do with the conclusions of the learned chancellor, the decree of the Circuit Court is affirmed.

AFFIRMED.

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F. W. WALSH,
Defendant in Error,
vs.
CITY OF CHICAGO,
Plaintiff in Error.

PROCEED TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This cause is before the court for the second time. The judgment obtained by plaintiff on the first trial this court reversed because the trial Judge erroneously held that the affidavit of meritorious defense did not state a defense and excluded evidence tendered in support of the defense set forth in such affidavit. Walsh v. City, 185 Ill. App. 521.

This action is founded on a contract between the city and plaintiff for the transportation by water of city garbage. The contract was ended by efflux of time and plaintiff was paid all he claimed with the exception of \$1200, which he seeks to recover in this action.

It is not denied that this \$1200 is due under the contract, but defendant seeks to recoup damages it claims to have suffered by reason of plaintiff furnishing unseaworthy boats, which resulted in one of them sinking in the Chicago river, occasioning loss to defendant of some garbage boxes belonging to it, also causing obstruction of the river. The value of the garbage boxes lost and the cost of clearing the harbor of the obstructions therein caused by plaintiff's alleged negligence were adjusted by

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the Commissioner of Public Works at the sum of \$1200. On a trial before the court without a jury there was a finding and judgment for \$1200, the amount claimed, and defendant appeals.

We do not deem it proper to disagree with the conclusions to which the trial court arrived on the facts, because the evidence is conflicting and a finding in defendant's favor might be sustained if such had been made by the trial Judge. We must therefore concede to the trial Judge and his findings the presumption, which obtains from his having seen and heard the witnesses and observed their manner in the giving of their testimony, of his being therefrom better able to judge of their credibility and to determine the weight which ought to be given to their testimony. These advantages are not possessed by us and we therefore yield our judgment to that of the trial Judge, in view of the advantages available to him but denied to us.

There are no questions of law involved in this case, as the trial Judge was not requested to hold any proposition as the law of the case. The questions in dispute are of fact. We see no reason for disagreeing with the conclusions reached by the trial Judge, for we are unable to say that his findings are palpably contrary to the weight of the evidence. Furthermore, the Chicago river is a navigable stream under the control of the Federal government. The city could not have been compelled to remove the obstruction to navigation following the sinking of the garbage boat; therefore it cannot enforce a claim against plaintiff for the cost voluntarily assumed in doing that which the law did not cast upon it

the duty to do. We think City v. I. C. Ry., 242 Ill. 30, is in point on principle. The city not being compelled to repair a sidewalk did so and sought to recover the cost of so doing from the I. C. Railway, and it was held that no recovery could be had. Here the city, not being liable to clear the river of the obstruction to its channel resulting from the sinking of plaintiff's garbage boat, did so, and now seeks to be reimbursed therefor by plaintiff. By analogous reasoning we hold that such claim cannot be enforced at law.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

293 - 22248

THE TRIBUNE COMPANY,
a corporation,
Defendant in Error,

vs.

K. T. MCCARTHY and N. E.
BYRNE, copartners doing
business as MCCARTHY &
BYRNE,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

The controversy in this suit relates to a contract for advertising between plaintiff and defendants, in which a judgment for \$886.45 was entered in favor of plaintiff, upon the verdict of a jury instructed by the court, from which judgment defendants seek this review and ask a reversal.

The verdict in this case was instructed by the trial Judge at the close of all the proofs, which included all the proofs proffered by defendants. Neither the contract nor the liability of defendants thereunder to plaintiff is in dispute. The contest relates solely to the amount due. Defendants claimed at the trial that they were entitled to a credit of \$35.43, which plaintiff had failed to allow on the account. Plaintiff conceded a credit for this item. Defendants also claimed that two items of \$207.26 and \$178.96, evidenced by defendants' checks to plaintiff, had not been credited. An examination of the account shows that in this contention they were in error. After the maturing of the indebtedness in suit defendants wrote to plaintiff the following letter:

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"We feel your generous spirit in granting us the time you have in payment of our bills and we regret that we have to trespass so severely. You can rest assured that the least easement in the real estate market will enable us to dispose of some of our holdings, when we shall promptly remit as we so well recognize we should.

We enclose check for \$165.24 to cover October, November and December and hope by close of month we will be able to reduce a few more months."

We are constrained to believe from the evidence that the defense interposed is inspired from financial stress and not from any meritorious claim for credits not allowed. The defense was an affirmative one, which defendants failed to maintain by their proofs. It was therefore the duty of the court to instruct the verdict in favor of plaintiff, which it did. Defendants admitted in writing the correctness of plaintiff's claim after receiving its itemized statement. They failed to prove the incorrectness of any of the items of such statement, barring only the one for \$35.43, which plaintiff conceded.

Plaintiff has failed an additional abstract. This was made necessary by reason of imperfections in defendants' abstract. The cost of the additional abstract will therefore be taxed as costs in the cause.

We are of the opinion that the verdict and judgment do exact justice between the parties and that the record is free from reversible error; therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

313 - 22268

THOMAS N. HUNT,
Defendant in Error.

vs.

WILLIAM I. KEATING,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDON DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment for \$1000 on the verdict of a jury in an action of fraud and deceit against defendant, who seeks this review and asks a reversal.

Defendant sold to plaintiff a half interest in the Halsted Hand Laundry owned by himself and one Fred Kuntz as partners. The fraud alleged consisted of representations by defendant to plaintiff of the value of the machinery and good will of the Halsted Hand Laundry business and in the amount of business which the laundry did and the profits which it made. Defendant was in the laundry business, but plaintiff was a stranger to that business. Plaintiff relied upon the truth of the representations made by defendant and in faith of the verity of such representations paid defendant \$800 in cash and gave a note for \$700 in addition, in which note Kuntz was joint maker, ^{and} which note was secured by a chattel mortgage given by plaintiff and Kuntz to Keating upon the laundry property.

The statement of claim alleges that the representations were false and were known to be false by defendant when he made them, and that the operation of the laundry demonstrated their falsity, and that instead of making money the laundry lost about sixteen dollars each week.

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Defendant, on account of the non-payment of the note secured by the chattel mortgage, foreclosed the same and bought the mortgaged property at the foreclosure sale.

Defendant relies for reversal upon the contentions that the amended statement of claim states two causes of action, and that his motion to strike the same from the files was denied, that the verdict is against the law and the evidence, errors in the admission and exclusion of testimony, in denying the motion for a new trial and in arrest of judgment, and in entering judgment.

It is quite true that the statement of claim states a dual cause of action, - one for fraud and deceit and the other seeking to avoid the contract. The reasons for the motion, however, are made and argued in this court for the first time. While defendant moved to strike plaintiff's amended statement of claim from the files, he gave no reason for such motion. In order to avail of a variance in a statement of claim or the statement of a dual cause of action, in a motion to strike such statement from the files, reasons therefor must be given to the trial judge. If there was a variance and the motion was made on that ground, the defect could be cured by amendment; and it is likewise the case if two causes of action were stated; such defect could be cured by an amendment which would eliminate one of them. A mere motion so to strike without assigning reasons, is meaningless. Such irregularity is in this condition of the record cured by verdict.

There are errors in the rulings of the court upon both the admission and rejection of evidence, but they were not material to the issue and do not affect the ultimate

merits of the case. The evidence of plaintiff, if uncontradicted, is sufficient to sustain the verdict, and it was for the jury to say from all the evidence as to which of the witnesses their judgment might dictate were worthy of credit and to find a verdict accordingly.

We further think the evidence establishes the fact that defendant was not so much in the laundry business as he was in the business of selling laundries. This particular laundry had been sold several times, and the purchasers prior to the purchase by plaintiff, in dispute, lost their interest in the laundry in the same way as did plaintiff. It is a logical deduction from the testimony that, in a little more than two years, defendant from repeated sales of his interest in the Halsted Hand Laundry realized over \$4000; that on one occasion defendant stated that the only way to make money out of the laundry was to sell his interest in it. When plaintiff expressed a desire to call in a laundryman to look the property over, defendant told him it was not necessary; that if things were not as he represented, he would take the laundry off his hands or find a purchaser. Plaintiff evidently relied upon the bona fides of this statement when he closed the purchase. In this he was deceived to his undoing. This was a fraudulent representation, upon the assumed verity of which plaintiff had a right to rely, and he was therefore excused from making any independent inquiry from those having knowledge of the laundry business, according to his expressed intention.

There was evidence in the record from which the jury had a right to believe that defendant said to plaintiff, "I will tell you the best thing to do; you have

been here long enough; you had better sell out. There have been experienced laundrymen in this place, and they could not make any money - they had to go out - you had better sell this laundry. I am a laundryman, but I could not make any money here. The machinery is not adequate to turn out enough work to make the money. This is one of the best salable laundries on the South Side; you can get some sucker to buy this laundry", to which plaintiff replied, "It will only be sold by me in a straight, honest and business like way." If the jury believed that defendant made such a statement, it tended to characterize the conduct of defendant and his methods as dishonest.

Defendant's veracity was also impeached by several witnesses, and the jury had the right - which they seem to have exercised - to disbelieve defendant's testimony where it was in conflict with that of plaintiff and his witnesses.

The jury had a right to find that the representations constituting the fraud and deceit averred were proven, and that the defendant knew the representations made were false at the time he made them, and that they were made with the evident purpose of deceiving and defrauding the plaintiff in the transaction.

The abstract of defendant is extremely unfair and omits, we must assume designedly, evidence which supports plaintiff's contentions and establishes the fraud and deceit charged against defendant. The additional abstract filed was therefore necessary to a fair consideration of the case, and the expense of such additional abstract will be taxed as costs in the cause.

We think the judgment of the Municipal Court does justice between the parties and it is therefore affirmed.

AFFIRMED.

ETHEL M. CANN et al.,

vs.

BILL.

LESLIE C. HUGHES et al.,

vs.

LESLIE C. HUGHES et al.,

Appellants,

vs.

CROSS BILL.

JACOB CROSS et al.,

Appellees.

APPEAL FROM CIRCUIT
COURT OF CHICAGO.

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

The original bill sought a partition of certain real estate in Chicago between Ethel M. Cann and Leslie C. Hughes, brother and sister, tenants in common of the property of which partition was sought. Incidentally the bill sought to remove certain tax deeds to Cross as being invalid and a cloud upon the title, and offered to do equity by making such payments to Cross as the court might direct. Cross answered, insisting that his tax deeds were valid and that the property was his in virtue of such deeds, and that neither Cann nor Hughes nor any one else had any right or title in or to the property. The other defendants answered and replications thereto were filed and the cause stood at issue and was referred to a master, but no hearings were had or proof taken before him.

While the suit for partition was pending, the City of Chicago for the use of schools commenced condemnation proceedings against the property sought to be partitioned, in which all the parties to this record were parties and appeared and had their rights adjudicated. In the condemnation proceedings Cann and Hughes were found to be tenants in common

subject to the amounts, with interest, expended by Glos in the payment of taxes, evidenced by the tax deeds to him. The value of the property was found to be \$20,500. The court also found that the partition suit was pending and that the amount expended by Glos for his tax title amounted, with interest, to \$665.44, and ordered that said to be paid to the County Treasurer. In this condition of the litigation Hughes filed in the partition suit his cross-bill, in which he set up all the facts in the condemnation proceeding, including the money found to be due Glos and ordered paid to the County Treasurer. In his cross-bill Hughes averred that "there remains nothing further to be done in these proceedings under the bill for partition herein, except to provide for the distribution and payment to the parties entitled thereto of the said sum of \$665.44 now held by the County Treasurer of Cook County, in accordance with the provisions of the said judgment order entered December 5, 1914, in the said condemnation proceeding." Glos answered, denying Hughes' title to the property set up in the cross-bill, and every other material averment of the cross-bill, which latter by interpretation included a denial of the averment that Hughes was entitled to the money in the hands of the County Treasurer. Glos also filed a cross-bill which was never answered and was finally abandoned. The decree appealed from by Hughes dismissed the bills, original, amended, supplemental, and cross, and awarded to Glos, under the Hughes cross-bill, the \$665.44 in the county treasury.

The decree recites that from "the pleadings, the evidence and the proceedings herein," Glos is in equity entitled to be paid the money deposited with the County Treasurer under the order in the condemnation proceedings,

pursuant to that order and decrees that the same be paid accordingly.

Appellant argues that the decree is erroneous, first, because Glos was not legally entitled to the amount decreed him, and, second, because there were no pleadings before the court entitling Glos to affirmative relief. There is no certificate of evidence in this record; therefore, in law, every intendment is to be indulged necessary to sustain the ultimate facts found by the decree. The ultimate fact found by the court from the evidence is that Glos is entitled to the amount deposited with the County Treasurer under the order entered in the condemnation proceeding.

It will be presumed as matter of law, in the absence of a certificate of evidence, that the evidence is sufficient to support this finding in the decree. It is not necessary to recite evidential facts in a decree. The ultimate fact found from the evidence is sufficient. Allen v. LeRoyne, 102 Ill. 25; King v. King, 215 ibid, 100; Lange v. Meyer, 195 ibid, 420.

The pleadings in the partition suit challenge the validity of the Glos tax title. The cross-bill in the partition suit by appellant Hughes recites the proceedings in the condemnation suit and the award made to Glos for payments made by him for his tax title, with interest, and the payment of such amount into the county treasury, claiming and his co-tenant, Ethel M. Cann, were entitled to pay. We think that the tax title of Glos was attacked by angle of the partition bill and cross-bill. More- the propriety of the order in the condemnation proceedings not challenged and therefore its integrity stands ad-

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mitted so far as the record before us is concerned.

Appellant by his cross-bill restricted his rights in the partition litigation to one question, viz: as to who was entitled to the money paid to the County Treasurer under the order in the condemnation proceeding. That was the only matter, in all the varied branches of the litigation which had been before the court, calling for its decision and settlement. It would almost seem that appellant would be estopped, under the state of the pleadings, to dispute the right of the court to determine to whom the money should be paid. That was the evident, sole, and only purpose of appellant's cross-bill. In a measure it partook of the elements of a bill of interpleader, in which the question of who was entitled to the money in the hands of the County Treasurer was a question, and the only question, to be determined by the court. To hold otherwise would tend to a perversion of justice by depriving Glos of the money to which, in the litigation between all of the parties, the court had solemnly held he was entitled.

After the condemnation proceedings the money awarded stood in the place of the land, and from that money Glos was entitled to be paid the amount of his claim. In the partition proceeding, but for the intervention of the condemnation proceeding, under the pleadings and the proof Glos would have been entitled to be decreed the amount due him, and appellant and his co-tenant, Gann, decreed to pay such amount as a condition precedent to the removal of the cloud and lien created by Glos' tax title.

The decree of the Circuit Court does justice between the parties and is affirmed.

AFFIRMED.

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287 - 22342

ETHEL M. CANN and
WILLIAM A. CANN,
Appellants,

vs.

LESLIE C. HUGHES et al.,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from the same decree in which the appellee Leslie C. Hughes also appealed to this court. The original mover in the case was appellant Ethel M. Cann. She and her brother, the appellee Hughes, were the owners as tenants in common of certain real estate in Chicago, which appellant sought, subject to the tax title claims of Glos, a party defendant, to have partitioned. The property was subsequently taken for the use of schools in certain condemnation proceedings by the City of Chicago. All the parties in interest in the land were parties to the condemnation suit and appeared in that suit and litigated their several claims. The property was condemned and an award of damages amounting to \$20,500 made. Of this amount \$665.44 was found to be due Glos for his tax title interest and ordered to be paid to the County Treasurer of Cook County. Leslie C. Hughes thereafter filed in the partition suit his cross-bill, by which he sought to have the last mentioned money decreed to be the property of his sister, the appellant, and himself, and not the property of Glos.

In the appeal of Hughes, general number 22325, we coincidentally herewith have handed down an opinion. For the reasons in that opinion set forth, the rights and interests of

appellant here being the same as those of the appellant in number 22525, the decree of the Circuit Court is affirmed.

AFFIRMED.

390 - 22346

H. D. SMITH & COMPANY,
a corporation,

Appellant,

vs.

AURORA AUTOMATIC MACHINERY CO.,
a corporation,

Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of nil capiat and for costs entered on the finding of the trial Judge, to whom the cause was submitted for trial without a jury. The action is for damages for an alleged breach of contract for 25,000 "crank forgings." Each party claims the other breached the contract. It is evident from the finding and judgment of the trial Judge that he concluded that the plaintiff so far breached the contract that it could not, under the circumstances, maintain an action for any damages which it might have suffered by reason of the refusal of defendant to carry out its part of the contract.

On October 4, 1913, defendant, through its purchasing agent, wrote plaintiff: "Please cancel the above order for crank forgings," and plaintiff responded to this request by a letter to defendant in which it wrote: "Most assuredly we will not accept your cancellation of your order * * * as per your letter of the 4th inst. Your order was accepted in good faith after special quotations had been made to you. * * * Unless we have your instructions here by the morning of the 14th to proceed with the order as originally placed with us, the matter goes into our attorney's hands," and into the hands of plaintiff's attorney the

matter went.

There were other negotiations by letter and through plaintiff's attorney, which culminated in a letter from defendant to plaintiff of November 11, 1913, in which the troubles between them were recited, and the writer, after expressing regret that plaintiff should have seen fit to put the matter into the hands of its attorney, said: "The writer had a conversation with him" (plaintiff's attorney) "requesting that you make shipment of the crank forgings, 2,000 sets per month, until the order was completed. To this arrangement he objected. The writer then told him that you should make shipment of the entire order as soon as you could do so, and that we would accept delivery. He insisted upon our paying \$1500.00, this amount to be deducted from the invoices as you made delivery. Now we do not think that you should insist upon any such demands when we are willing to take the forgings as soon as you can make delivery. * *"

Defendant, on December 5, 1913, telegraphed plaintiff: "When can you deliver 2,000 each right and left crank forgings? Wire answer," to which plaintiff replied: "Your telegram of even date referred to our attorney in Chicago." After plaintiff's attorney had refused to make any deliveries of crank forgings unless defendant paid \$1500 in advance, defendant, December 15, 1913, wrote plaintiff as follows: "On account of the refusal of your firm, through your attorney, to deliver any forgings for cranks in accordance with our order of May 19th, 1913, we have decided to cancel that order," to which plaintiff replied and said, inter alia: "We do not believe under the circumstances,

that any one would trust you or give you any credit, and we believe thoroughly the court will uphold us, particularly when a number of records are produced to them. If you do not wish to play fair, we will have to see whether you cannot be made to play fair."

Counsel in the brief for plaintiff testified as a witness that he knew the contract provided for payment in sixty days after the goods were shipped, and, so knowing, he refused to advise his client to ship the forgings unless \$1500 was paid in advance or plaintiff was otherwise indemnified.

If plaintiff had acted upon the attempted cancellation by defendant October 4, 1913, of the contract, it would have had a right of action to recover whatever damages it might have sustained by reason of defendant's thus breaching its contract; but plaintiff sought to hold defendant to the terms of the contract, whereupon defendant, realizing its obligation thereunder, gave instructions to plaintiff to fill the contract by starting shipment of the forgings.

Plaintiff through its attorney then endeavored to make a new contract with defendant, and insisted on payment of \$1500 or of indemnity as a sine qua non for performance on its part of the contract between them. Defendant, as it had a right to, refused to do this, and cancelled the contract, as above recited.

We think the case presented by plaintiff so clearly demonstrates that it was primarily in default in

refusing to carry out the contract as made and in endeavoring through its attorney to impose new conditions, that it has no remedy for any damage which it may have suffered, because such damage flows from its own action in refusing to carry out the contract as made.

Agreeing, as we do, with the conclusion and judgment of the learned trial Judge, the judgment of the Municipal Court is affirmed.

AFFIRMED.

BURKETT O'VENU,)	
Appellant,)	
	)	APPEAL FROM SUPERIOR COURT
vs.)	
	)	OF COOK COUNTY.
ESTHER O'VENU,)	
Appellee.)	

MR. JUSTICE BOLDON DELIVERED THE OPINION OF THE COURT.

The parties to this appeal are husband and wife. The husband charged his wife with adultery and filed his bill seeking a divorce on that ground. The wife answered, denying the adultery charge. On a hearing before the Chancellor the bill was dismissed for want of equity, and appellant prosecutes this appeal.

The parties were married in June, 1904, and in 1914 were living separate and apart. Appellee was living with two of her children in an apartment on the top floor of 660 east Forty-third street, Chicago, and at this place, appellant charged, appellee committed acts of adultery. The adulteries are alleged to have been committed with an unknown man, and the testimony of detectives is relied upon to establish the charge. If the testimony of these detectives is true, appellee is guilty. On the other hand, appellee denied on the witness stand the adultery charges categorically. She also produced witnesses of repute, who were her neighbors and would have been likely to have seen occurrences about which the detectives testified if there had been such occurrences, who negatived the probability of any adulterous acts on her part having taken place. It is a suspicious circumstance that these detectives, who claimed they saw appellee's alleged paramour on several oc-

essions, were unable to identify the man or trace him in any way.

Adultery is never presumed. It must be proven, and while it is a crime of secrecy, it may be established by acts proven from which the inference of adultery may follow. There are no presumptions of law favoring guilt. On the contrary, the presumption of innocence must be indulged until evidence of a convincing nature sufficient to overcome such presumption is found in the record.

While adultery may be established by circumstantial evidence, such proofs must convince the mind affirmatively that actual adultery was committed, as nothing short of the criminal act can lay a foundation for a divorce. Bishop on Marriage and Divorce, vol. 2, p. 613.

In acts which are capable of a dual construction - one of innocence and the other of guilt - that of innocence will be indulged. And so in this case. It seems that a man named Kaiser, an employee of the Commonwealth Edison Company, who lived in the apartment below appellee's apartment, was in the habit of going in and out of the apartment building at all hours of the night. Kaiser testified that he did not see any man visiting the apartment of appellee at night. If such a man as testified about by the detectives had been in the habit of visiting at appellee's apartment, it seems quite probable that Kaiser at some time when he was going in or out of the apartment building would have seen him. Furthermore, Kaiser may be the man whom these detectives saw in the nighttime coming from and going to his work from his apartment.

It is the law that the testimony of detectives is to be closely scanned and regarded with suspicion, and where such testimony is contradicted by credible evidence,

the chancellor has the right to disregard it. Blake v. Blake, 70 Ill. 618. The learned Chancellor saw the witnesses for the parties, observed their manner of testifying, their appearance upon the witness stand, and their candor or lack of it, if such were apparent, and was therefrom much better able to judge of the weight to be accorded to the testimony of the several witnesses than are we, who have nothing but the unresponsive record before us.

After carefully weighing the evidence in the record we are inclined to concur in the conclusion at which the Chancellor arrived, and the decree of the Superior Court is therefore affirmed.

AFFIRMED.

ELIAS B. WOOLF, SIDNEY
KAHNWEILER and EMIL KORITZ,
co-partners doing business
as E. B. WOOLF & COMPANY,
Appellees,

vs.

ALFRED HAMBURGER,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

This is an action of assumpsit brought to recover on a quantum meruit commissions claimed by plaintiffs for the sale by them of a printing plant of defendant. No question arises on the pleadings. Plaintiffs were employed by defendant to sell his printing plant in Chicago. Through one Friedman, a broker in plaintiffs' employ, the plant was sold to one Washington Flexner for \$30,000. That there were negotiations between Friedman and defendant regarding the making of a sale is not disputed. That Friedman introduced defendant to Flexner, who ultimately bought the plant for \$30,000, is admitted. Defendant contends, however, that because the initiatory negotiations were suspended and not until several months thereafter was the sale finally consummated, and then through defendant's own efforts and negotiations, the plaintiffs are not entitled to any compensation.

We think the trial Judge, to whom the cause was submitted for trial without a jury, might well find from the evidence that defendant employed plaintiffs to make the sale and that the sale was made, upon terms satisfactory to the parties, to the purchaser furnished by plaintiffs through their broker, Friedman. We think the law governing this case is accurately stated by the late Judge Moran in Davis v. Gassette, 30 Ill. App. 41, thus:

"In order to be entitled to commissions it is indispensable that the broker should show that he has produced a purchaser ready and willing to take the property on the terms specified or that his efforts were the procuring cause of the sale which the principal has made to the purchaser with whom he has been brought into communication."

Plaintiffs produced Flexner, the purchaser, to defendant, and while in the preliminary negotiation Flexner was unable to come to terms with defendant and did state that he could not buy the plant for himself but expected to sell it to a third party, nevertheless the fact remains that he did purchase the plant from defendant upon terms agreed upon between them. Plaintiffs were therefore the efficient procuring cause of the sale.

Defendant proffered certain propositions of law, which the court marked "Held"; notwithstanding these propositions stated the law, yet as they were not applicable to the facts established by the evidence, the court did not err in refusing to heed them.

Plaintiffs produced a witness who swore that the usual, customary and reasonable commissions would be five per cent upon the amount of the sale; and defendant, to offset this, tendered a witness who testified that two and a half per cent was the usual and customary commission payable for such a sale. This was all the proof on that subject.

The learned trial Judge, for some reason not disclosed by the record or inferable from it, arbitrarily fixed the amount to be recovered at a sum less than the minimum amount testified to by the witnesses. This was error. The court could not set up its undisclosed judgment as a basis upon which to assess damages. One or the other of the rates fixed by these two witnesses the learned trial Judge might have adopted as such measure of damages, or he

might have assessed plaintiffs' damages at a sum between these two rates, but he had no right to make such assessment above the maximum or below the minimum rate supported by the testimony found in the record. Damages must be assessed from the evidence found in the record. None can be assessed denors such record. Plaintiffs have assigned cross-errors on this question, but in the condition of the record such cross-errors cannot be heard. No objection or exception was made or preserved upon the trial by plaintiffs to this action of the court. Nevertheless we are not prevented from entering such judgment here as should have been entered by the trial judge.

The judgment of the Circuit Court is reversed and a judgment will be entered in this court in favor of plaintiffs and against defendant for the sum of \$750, with costs here and below to be taxed against defendant.

REVERSED AND JUDGMENT HERE
FOR \$750.

413 - 22368

OSWEN A. HUNT,
Appellee,

vs.

SARAH MARIE HUNT,
Appellant.

APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

MR. JUSTICE HOLCOMB DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal. Appellee filed his bill in equity to annul his marriage with the appellant on the ground that she had been divorced from her former husband by a decree of the Circuit Court, which decree inhibited her intermarriage with a third party until the lapse of two years from the entry of the decree. The bill avers that the decree of divorce freeing appellant from her prior marital alliance was entered July 7, 1906, and that on July 11, 1906, thereafter she was married to the appellee at the city of Hammond in the State of Indiana, and that that marriage was void, and praying for its annulment. Appellant answered the bill, admitting all the material facts except the charge of having been divorced as alleged. On a trial before the Chancellor the relief prayed was granted and the marriage annulled accordingly and a decree to that effect entered; defendant in that suit is the appellant here.

Appellant now contends that the decree is erroneous because there is no finding in it that the decree in the divorce case was entered of record in the Circuit Court. The record before us is certified as a complete transcript of the proceedings before the Chancellor. All that appears in this transcript is the chancery record. There is no certificate

of evidence found in the record, although the decree after reciting all the jurisdictional facts finds that the Court heard all the evidence adduced in open court, the arguments of counsel, etc. In the absence of a certificate of evidence it will be presumed that the Court heard evidence sufficient to sustain the findings of the decree and to warrant the granting of the relief decreed.

Among the findings of the decree are these: that the defendant as Sarah Marie Novak was divorced by one Frank J. Novak, on the grounds of adultery, by the Circuit Court of Cook County, Illinois, on the 7th day of July, 1906, and that said decree provided, among other things, that the complainant do not marry again within one year, and that the defendant do not marry again within two years from the entry of said decree, unless they marry each other. There is nothing in the record impeaching the verity of these facts, consequently the decree in this regard is impervious to attack in this proceeding or collaterally.

It is the law in this State that if a marriage in which one of the parties is forbidden to marry within a given time is celebrated within that time, such marriage is void and may be annulled, as in the case at bar.

The decree of the Superior Court being right is affirmed.

AFFIRMED.

446 - 22401
447 - 22402

HENRY F. WEYDEMT,
Appellee,

vs.

CITY OF CHICAGO et al.,
Appellants.

and

MICHAEL MOON,
Appellee,

vs.

CITY OF CHICAGO et al.,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The two above entitled causes were consolidated for hearing upon one set of briefs on motion of the appellant. Neither of the appellees appears or defends in this court. The cases are similar upon the facts with the exception of dates of occurrences alleged, which dates in no way affect the rights of the parties or the rulings of this or of the trial court.

The appellee in each case was connected with the Fire Department of the City of Chicago, each entered the department in a subordinate position, and each rose to the rank of captain; each was disabled and retired upon a pension; each recovered from his disability and was restored to his captaincy in the department and subsequently discharged by the Fire Marshal.

The petitions for mandamus in each case pray that the petitioner may be awarded writs of mandamus restoring him to his office of captain, and ordering that each be paid the salary of a captain, which they would have earned but for their unlawful removal from their positions. Neither petitioner

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pleads any ordinance creating the office of captain in the Fire Department of the city of Chicago. The respondents interposed a general demurrer to each petition, which was overruled, and petitioners electing to stand by their demurrers, the writs of mandamus prayed were awarded and respondents prosecute this appeal.

A petition for mandamus praying for dual relief such as in the cases at bar, is obnoxious to a general demurrer. Restoration to office and an award of salary for that office cannot be combined in a petition for mandamus. Gersch v. City, 192 Ill. App. 190; City v. Gray, 210 Ill. 84.

The fact that petitioners were pensioners during the time they suffered the disability contracted in the service of the Department, gave them no additional claim either for their reinstatement in office or to be reinstated upon the pension roll after their discharge.

Eddy et al. v. Morgan et al. 216 Ill. 437;

Hughes v. Traeger et al., 264 *ibid*, 612.

As the petitioners were not civil service appointees they could be discharged at any time without the preferment of charges or a trial before the Civil Service Board.

McNeill v. City of Chicago, 212 Ill. 481;

Kenneally v. City of Chicago, 220 *ibid*, 485;

People ex rel. Gersch v. City of Chicago,

242 *ibid*, 561.

It has been so often decided and so uniformly settled that a petition for mandamus which fails to plead an ordinance creating the office sought by the petitioner is obnoxious to a demurrer, and that unless it is first established that the office sought exists either by statute or ordinance,

the party seeking the office has no standing in a court of law, that the question must be considered as a closed one, not open for further discussion or adjudication in this jurisdiction.

Among the unreported cases in this court so holding are People ex rel. Rickland v. City of Chicago, No. 20699; Rudnick, Admr. v. City of Chicago et al., No. 20897; Vaughn v. City of Chicago, No. 21089; People ex rel. Hammer-schleg v. City of Chicago et al., No. 21795; People ex rel. Murphy v. City of Chicago, No. 21991; and among reported cases so holding are Stott v. City of Chicago, 205 Ill. 281; McNeill v. City of Chicago, 212 *ibid.*, 481; Moon v. Mayor, 214 *ibid.*, 40; Sullis v. City of Chicago, 235 *ibid.*, 472; Preston v. City of Chicago, 246 *ibid.*, 26. In these cases all the questions arising in the two cases now before us are discussed and decided contrary to the contentions of the appellees here.

For the reasons above indicated the judgment of the Circuit Court of Cook County in each case is reversed and the causes remanded to that Court with directions to sustain the demurrers and dismiss the petitions.

REVERSED AND REMANDED
WITH DIRECTIONS.

295 - 21691

GUSTAVE MUELLER,
Defendant in Error,

vs.

A. L. WARGNY,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Mueller, defendant in error, sued Alfred L. Wargny, plaintiff in error, to recover a balance of money loaned. The sole question raised here is whether the facts show a loan by plaintiff or a partnership transaction. The evidence is conflicting in some respects, but we think on the whole it tends to show that the court properly construed the transaction as a loan and correctly found \$375 to be the amount due and unpaid thereon.

~~Alfred~~ Alfred and his brother, Paul, were engaged in negotiating sales of automobiles. The transaction in question amounted to a sale of an automobile to Alfred from the Studebaker Company, at \$1540.88, (after deducting his so-called commission from the list price of \$1800,) and a resale by him to a customer for \$400 cash, \$970 in notes secured by a mortgage on the car, and an old car taken in exchange at a valuation of \$500.00. Evidently the Studebaker Company required a cash payment, and neither Alfred nor the customer being able to furnish it, \$1270 was obtained by Alfred from Mueller, which with the \$400 advanced by the customer enabled him to pay the Studebaker Company in cash. 618

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It appears that in previous transactions of a similar character, Paul had obtained money from Mueller and in each instance gave him in exchange the mortgage notes of the customer for the same amount and also a share of the profits in the transaction. In the instant case Mueller advanced the money at Paul's request, but there is a dispute as to whether the latter or Alfred made the contract with Mueller. As Paul and Alfred differ on that subject we think the court was justified in accepting Mueller's version, namely, that he was to get back notes and a mortgage to the amount of the loan, \$1270, and \$125 of the profits, and that he knew nothing about a car being taken in exchange until after the transaction was closed. He was given notes to the amount of \$870 and 25 in cash, leaving due \$375 on the loan, which as he understood was, as in the previous arrangements with Paul, to be paid in mortgage notes. He says that Alfred explained the failure to give the balance in notes by saying, in effect, that cash could be realized more quickly from sale of the second hand car, and it appears that Alfred and Paul undertook to sell it, but have not done so.

Plaintiff in error contends that it was a partnership transaction whereby Mueller agreed to furnish money to consummate a business deal and share in the profits.

We think the court was justified from the evidence in concluding that the specific agreement was that Mueller was to get back the amount of his loan in the shape of mortgage notes or cash, on the consummation of the deal, and a share in the profits to the amount of \$125. Hence the judgment will be affirmed.

AFFIRMED.

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Obey these rules and avoid fines.

Name _____

[illegible]

